

VOL 27 ISS 1 | I | HISTORY OF JUDICIAL IMMUNITY

It is often said that the doctrine of judicial immunity has ancient common law origins. While this may be true, some of the historical claims made for judicial immunity have been exaggerated. Some historians believe that under early English law, judges were generally liable for their wrongful acts, and judicial immunity was the exception and not the rule.¹⁵ Exaggeration has also occurred in respect to the history of judicial immunity in the United States. Indeed, even the Supreme Court has made some questionable assertions about the historical status of judicial immunity in this country. In a 1967 opinion, the High Court contended that the doctrine of judicial immunity had been settled and accepted throughout the states by the year 1871.¹⁶ More thorough research, however, has shown that in 1871 there was substantial variation about judicial immunity from state to state.¹⁷ In that year, thirteen states followed the rule of absolute immunity; nine states had considered the issue of immunity but had not ruled definitively on it; nine other states had not considered the issue; and six states had ruled that judges are not immune if they act maliciously.¹⁸

As a historical matter, the doctrine of judicial immunity arose in response to the creation of the right of appeal. In the tenth and eleventh centuries in England, when no right of appeal existed, losing litigants could challenge unfavorable judgments on the ground that they were false.¹⁹ The litigant was entitled to both the nullification of a false judgment and a fine (known as an amercement) against the judge who had rendered it.²⁰ As the right to appeal became available, it replaced amercements against judges, and gradually the doctrine of judicial immunity developed.²¹ In modern times, however, it has become questionable whether the availability of appeal is in all instances an adequate substitute for imposing liability on judges for their wrongful acts. Although a judge's act may eventually be reversed on appeal, the victim of the judge's behavior may have suffered damage in the interim for which appeal may not compensate. Indeed, irreversible and serious damage may have occurred, which is not correctable by appeal.

Nevertheless, once appeal became available, judicial immunity was gradually accepted under the common law. In the seminal case of *Floyd v. Barker*,²² decided by Lord Coke in 1607, judicial immunity was established for judges who served on English courts of record. In that decision, Lord Coke discussed for the first time what are

now considered some of the modern policies that underlie the doctrine of judicial immunity. Judicial immunity serves the following purposes according to Lord Coke:

- (1) It insures the finality of judgments;
- (2) it protects judicial independence;
- (3) it avoids continual attacks upon judges who may be sincere in their conduct; and
- (4) it protects the system of justice from falling into disrepute.²³

Some of the purposes that have been advanced in support of judicial immunity are less convincing than others. It is debatable whether any of them justify absolute, rather than limited, immunity for judges. In a nation such as ours, which is founded on freedom of speech and which encourages criticism of government officials, using judicial immunity to protect the reputation of the judiciary is barely, if at all, legitimate. Ensuring the finality of judgments may be a valid goal, but it is not strong enough to justify absolute immunity for malicious judicial behavior that causes serious harm to others. While innocent judges should be sheltered from continual harassment, what about judges who are not innocent? Protecting judicial independence is an extremely important goal, but still, one wonders if absolute immunity is necessary to safeguard the independence of the judiciary.

Today it is generally recognized that the most important purpose of judicial immunity is to protect judicial independence.²⁴ As the Supreme Court has said, judicial immunity is needed because judges, who often are called upon to decide controversial, difficult, and emotion-laden cases, should not have to fear that disgruntled litigants will hound them with litigation charging improper judicial behavior.²⁵ To impose this burden on judges would constitute a real threat to judicial independence. The question that remains, however, is whether absolute, as distinguished from qualified, immunity is necessary to protect judicial independence. Absolute immunity is strong medicine, justified only by a grave threat to the effective administration of justice.²⁶ As Justice Douglas suggested in his dissenting opinion in *Pierson v. Ray*,²⁷ perhaps immunity should not extend to all judges, under all circumstances, no matter how outrageous their conduct.²⁸

The grant of absolute immunity to judges has often been criticized, especially because it is judges who have granted absolute immunity

to themselves.²⁹ Referring to the rule of absolute immunity for judges, an esteemed commentator once remarked that a "cynic might be forgiven for pointing out just who made this rule."³⁰ Moreover, the rule has been applied in some infamous cases in which judges have engaged in egregious behavior. *Stump v. Sparkman*,³¹ a 1978 Supreme Court decision, was such a case. This case involved a state court order authorizing the sterilization of a fifteen-year-old girl on the petition of her mother. The mother's petition stated that the girl was somewhat retarded and had begun dating men, making sterilization necessary to prevent pregnancy. However, the girl's high school record indicated that in all probability she was not retarded.³² The state court judge who granted the petition ordering sterilization of the girl did not hold a hearing, appoint counsel or a guardian ad litem for the girl, or notify her of the petition or subsequent order.³³ Despite these flagrant violations of due process of law, the Supreme Court ruled that the state court judge possessed absolute immunity for his acts and could not be held liable for any harm they caused. Tremendous criticism has since been directed at the Supreme Court's decision in *Stump*,³⁴ but absolute immunity for judges remains the rule.

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Footnotes

¹⁵. Compare Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REv. 201 (1980) with Block, *Stump v. Sparkman* and the History of Judicial Immunity, 1980 DUKE L.J. 879.

¹⁶. See Pierson, 386 U.S. at 560.

¹⁷. See Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969).

¹⁸. *Id.* at 326-27.

¹⁹. See M. COMISKY & P. PATTERSON, *THE JUDICIARY-SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE* 233 (1987).

²⁰. *Id.*

²¹. *Id.*

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

²³. *Id.* at 1307.

²⁴. See C. WOLRAM, *MODERN LEGAL ETHICS* 970 (1986).



- ²⁵. See Pierson v. Ray, 386 U.S. 547, 554 (1967); see also Forrester v. White, 484 U.S. 219, 226-28 (1988).
- ²⁶. See Forrester v. White, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting), rev'd, 484 U.S. 219 (1988).
- ²⁷. 386 U.S. 547 (1967).
- ²⁸. See id. at 558-59 (Douglas, J., dissenting).
- ²⁹. Compare Note, supra note 17 with Kates, Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered, 65 Nw. U.L. REv. 615 (1970). See also Laycock, Civil Rights and Civil Liberties, 54 CHI.-KENT L. REv. 390 (1977); Nagel, Judicial Immunity and Sovereignty, 6 HASTINGS CoNsr. L.Q. (1978); Feinman & Cohen, supra note 15; Block, supra note 15.
- ³⁰. W. PROSSER, TORTS 987 (4th Ed. 1971).
- ³¹. 435 U.S. 349 (1978).
- ³². See id. at 351.
- ³³. Id. at 360.
- ³⁴. See Nagel, supra note 29; 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 Immunity, 64 VA. L. REV. 833 (1978); Feinman & Cohen, supra note 15; Block, supra note 15.