Liberty Tree

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More equal than others

JUDGING their own cause

Part IV

The Supreme Court building in Washington, D.C., completed in 1935, and bears the inscription "Equal justice under law." The phrase is alleged to paraphrase the opinion in *Caldwell v.Texas*, 13 U.S. 692 (1891), stating, regarding the Fourteenth Amendment: "the powers of the States in dealing with crime within their borders are not limited, but no State can deprive *particular persons or classes of persons of equal and impartial justice under the law*." The class of particular persons who are victims of judges should likewise receive impartial justice.

In the last issue of the Liberty Tree, we discussed the U.S. Supreme Court case of *Bradley v. Fisher,* 80 U.S. 335 (1871), which stated, as dictum,[1] that judges are *immune* from suit for personal damages brought by a plaintiff who was injured by their "judicial" actions. In this issue, we will examine the sophistry of those judges in establishing, in their own self-interest, the gaping hole in American justice known as the "absolute judicial immunity" doctrine.

"Justice" Stephen Field, the author of the *Bradley v. Fisher* opinion, was a despicable man[2] appointed by Lincoln to the U.S. Supreme Court. Just three years prior to *Bradley v. Fisher*, this same petty tyrant authored a Supreme Court decision determining that State judges could not be sued. That case was *Randall v. Brigham*, 74 U.S. 523 (1968). Just like the *Bradley* case, the *Randall* case concerned a lawyer (Randall) who sued a judge for removing him from the bar for malpractice and misconduct. While the lawyer claimed that he was not formally charged with the misconduct, and no formal statement was made to him, the record showed that he had plenty of opportunity, and took it, to explain his conduct; he introduced testimony before the judge, and was sworn himself. On this finding alone, the claims of Randall failed. Just as in *Bradley*, however, Field took the opportunity to introduce the doctrine that judges can't be sued, anyway.

Announcement of a "rule"

Writing for the *Randall* Court, Field announced:

> [I]t is a general principle applicable to all judicial officers that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts in excess of jurisdiction are done maliciously or corruptly.

"In excess of" means greater than one's jurisdiction, or, put another way, *outside of the limits* of one's jurisdiction. Field thus first admitted that judges of "limited and inferior" authority — such as justices of the peace, judges of orphan's courts, etc. — are, under the common law, *liable* to plaintiffs when they take a judicial act they are not authorized to take. But judges of superior or general authority can damage a person by exceeding their jurisdiction, and other judges will protect them from liability for any such damages.

Judges are accountable to the people ...

As he later did in *Bradley v. Fisher*, Field cited the report of Lord Coke in *Floyd and Barker*, 1608, explaining that because the judges administered justice under the King to all his subjects, they ought not be called in question in any judicial proceedings, but only before the King himself. Then Field acknowledged that

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1. *I.e.,* in language unrelated to the grounds upon which that Court actually decided the case
2. One of his critics stated that, "if analyzed," his life would be "found to be one series of little-mindedness, meanlinesses, of braggadocio, pusillanimity, and contemptible vanity."

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in America, the judges are the delegates of the *people*, not a king:

> In England, the superior judges are the delegates of the King. Through them he administers justice, and to him alone are they accountable for the performance of their trust. ....
>
> In the United States, judicial power is vested exclusively in the courts. ***The judges*** administer justice therein for the people, and ***are responsible to the people alone*** for the manner in which they perform their duties. If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account by impeachment and removed from office... .

Thus, Field realized that *Floyd and Barker* is *not* applicable to judges in the United States, where judges are not ultimately accountable to a king.[3]

In America, the *people* are the sovereigns, and judges "are responsible to the people alone." Once installed in their office, judges are not dependant upon any government official for their tenure or salary, and so they are "independent." But the only mechanism to hold them accountable to the people which Field recognized was the constitutional provision for impeachment, noting that the States also have such constitutional provisions.

As Thomas Jefferson noted, "[E]xperience has already shown that the impeachment [the Constitution] has provided is not even a scarecrow ..."[4] Impeachment — removing judges who are acting corruptly, dishonestly, or oppressively — is rarely tried in practice,[5] and it does not serve one of the fundamental aims of justice, to remedy specific persons for injuries done to them.

Although accountable to the "people alone," Field denied that judges are accountable to the *specific* people they have violated:

> But responsible [the judges] are *not* to private parties in civil actions for their judicial acts, *however injurious may be those acts* and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges and are done maliciously or corruptly.

While Field stated in *Randall* that "perhaps" a judge could be sued where the acts done obviously exceeded the limits of jurisdiction and were also done with evil intent, just three years later, he took the next step, declaring in *Bradley*:

> In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used [in *Randall*] 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*.

Only two Justices did not agree that judges should be exempt from liability where actions taken in excess of jurisdiction were done for ma-

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Some animals ere more equal than others

Animal Farm, an allegorical novella by George Orwell published in 1945, tells the story of farm animals, led by pigs, who rebel against their farmer and take over the farm for themselves. At the beginning of the rebellion, Major, the great pig orator, tells the other animals, "no animal must every tyrannise over its own kind ... All animals are equal." Once the farmer has been vanquished, however, the pigs begin to tyrannize over the other animals, and eventually justify their tyranny by teaching the animals a new commandment: "All animals are equal, but some animals are more equal than others." This proclamation by the pigs who control the farm describes the hypocrisy of governments who proclaim the absolute equality of citizens before the law, but nevertheless give power and privileges to certain citizens.

In America, one of those elite are the judges, who operate with a special privilege called "immunity." This special privilege allows them to operate with impunity in violating the rights to life, liberty and property of people who come before them without ever being required to pay any type of restitution, or damages, to their victims.

3. In 1608, the king had power to remove judges at will — in other words, judges were not "independent" from the king. The English Bill of Rights of 1689 and the Act of Settlement in 1701 changed this, providing that judges' commissions were valid during good behavior (the same idea later expressed in the Constitution of the United States). Although the king appointed the judges, only Parliament was now allowed to initiate the removal of judges, by way of both houses submitting an "address," or petition, to the king for removal. This Act was meant to assure judicial independence *from the king.* Did that Act apply to the colonial judges? Since the *Declaration of Independence* states that, with respect to the American colonies, the king "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," it would seem not.
4. Thomas Jefferson to Spencer Roane, September 6, 1819, Works 12: 135-138.
5. Since 1797, only 11 federal judges have been impeached, 7 of which were removed from office.

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licious or corrupt reasons. As a result, the absolute judicial immunity doctrine widely practiced in the courts of America exempts judges from all liability for all judicial actions unless they are taken in "complete absence of all jurisdiction."[6]

Reparation is a benefit to the people

The preamble of the U.S. Constitution, states, in part "We the people of the United States, in Order to … establish justice … and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." If the people ordained the Constitution to "establish justice," then what benefit can there be to the people when a key principle of justice is ignored?

One of the principles of justice is reparation. As Lord Kames stated in his 1760 treatise, *Principles of Equity*, reparation promotes "two ends of great importance: it represses wrongs that are not criminal; and it also makes up the loss sustained by wrongs of whatever kind. With respect to the former, reparation is a species of punishment; and with respect to the latter, it is a branch of justice."

Lord Kames also described the reason for pecuniary (monetary) reparation — it restrains persons from acting rashly or incautiously:

> [W]ithout a pecuniary reparation, there would be no compulsion, other than that of conscience merely, to prevent culpable [blamable or faulty] omissions: and with respect to culpable commissions, the necessity of reparation is still more apparent; *for conscience alone, without the sanction of reparation, would seldom have authority sufficient to restrain us from acting rashly or incautiously*, even where the possibility of mischief is foreseen, and far less where it is not foreseen.

Lord Kames expressed what everyone understands from their own conscience: that if a person suffers by our own fault, we have a duty to make up for that person's loss. And threat of sanctions is necessary to restrain us from violating others' rights, because our conscience alone would be weak.

It is to the benefit of the public that all judges be subject to suit and liability for losses they have caused. The threat of having to pay reparation is stronger in restraining the judges than their conscience alone. Judges who are careful in considering the rights of the parties are a benefit to all people who seek true justice for themselves and their neighbors.

Let us contrast this benefit with the position taken by Field in *Randall v. Brigham,* the position articulated by judges before him, and which remains, to a large extent, the rationale given today for the privilege of judicial immunity.

Judicial immunity is a benefit to the judge

A bedrock of American jurisprudence is the Declaration of Independence, which famously declares:

> We hold these truths to be self-evident, that all men *are created equal*, that they are endowed by their Creator with *certain unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness.--

Judges, however, have been determined by judges to be "more equal" than all other men. In *Randall*, Field states boldly that "This exemption [jucidial immunity] from civil action is for the sake of the public, and *not merely for the protection of the judge*." In other words, the exemption is, first and foremost, for the protection of the judge.

For what reason should a judge be protected from the moral duty to provide reparation common to all other men? The protection is alleged to be needed because otherwise the judges would suffer from "a prosecution at the instance of *every* party imagining himself aggrieved, and be called upon in a civil action in another tribunal, and perhaps before an inferior judge, to vindicate their acts." Judges, it is said, must be protected from all persons who, losing their case, would ascribe malicious motives to the judge for his actions, and make him answer in another court for his decisions in the case.

The judges' sheer horror at being held to account for injuries done to specific parties can be seen from the English decisions Field quotes. In an 1813 case, *Taaffe v. Downes*, Justice Mayne stated:

> Liability to every man's action, for every judicial act a judge is called upon to do, is the *degradation* of the judge, and cannot be the object of any true patriot or honest subject. It is to render the judges *slaves* in every court that holds plea, to every sheriff, juror, attorney, and plaintiff. If you once *break down the barrier of their dignity* and subject them to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution, and establish its weakness in a degrading responsibility.

Note that the claimed "degradation" and the "slavery" of judges would come about because they would be subjected to *every* man's action for *every* judicial act. But judges would never be subject to action for every act they took in a case, since a prerequisite for maintaining a legal claim against any judge would be the showing of actual harm or loss to the plaintiff as the result of the judge's wrong actions.

Isn't it much more likely that, as judges, they simply want to be protected from any suits whatsoever for violating the rights of parties who come before them? Experience has shown that this doctrine repeatedly shields judges from having to make reparations for ma-

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6.In *Bradley*, Field defined "complete absence" of all jurisdiction, and we intend to explore that definition in a future article.

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licious violations of life, liberty, and property.

The "benefit" of judicial immunity to the people

Of course, admitting that the judicial immunity doctrine is only for the protection of the judge would make it all too obvious that judges are "more equal" than the rest of the public, *i.e.,* they are privileged to be above the moral law others must follow. Therefore, it is expedient to tell the public that judicial immunity benefits the public too.

Field quoted from Justice Fox, in the *Taaffe* case, to show the benefit to the public in establishing judicial immunity:

> There is something so monstrous in the contrary doctrine [allowing suits against judges] that it would poison the very source of justice and introduce a system of servility utterly inconsistent with the constitutional independence of the judges, an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the rights and liberties of the subject.

Justice Fox entirely failed to show how allowing judges to be free from personal accountability was inconsistent with preserving the rights of persons. Indeed, keeping victims from being able to sue the persons who have harmed them is the exact opposite of preserving the rights of the people. It ignores and denigrates those rights by refusing to allow them to be vindicated in a court of law.

In another attempt to show the benefit to the public from judicial immunity, Field quoted from a New York case, *Yates v. Lansing*, wherein Justice Kent stated:

> Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible.

This recalls the admonition of Lord Coke in *Floyd,* that if judges could be made to answer in lawsuits for the harm they caused anyone, "this would tend to the scandal and subversion of all justice." In other words, to make judges accountable would bring shame, reproach, or disgrace upon justice itself. It would completely and utterly overthrow and ruin justice.

This, then, is the only true claimed "benefit" to the public from judicial immunity: the public will not lose faith in the judicial system. Without immunity, the judges' authority would be destroyed, and they would become contemptible to the people.

If public *belief* that the judiciary is honest is most necessary to establish justice, rather than adherence to the principles of justice, then the judiciary is nothing more than a con game. If judges will not allow interested parties to bring suits against judges, then they are only participating in a cover-up. By hiding their own violations of peoples' rights, the judges make themselves out to be "more equal" than others, a privileged few who do not live by the moral rules of the rest of us.

Once the public catches on to the reality of this perverse doctrine, how will confidence in judges fare then? Disgust at judges' self-interest, and public knowledge that judges will never be held accountable for the injustices they commit, will destroy, and is destroying, the "authority" and "dignity" of the judiciary more surely than allowing suits against judges.

IN MEMORY OF Dr. Greg Dixon, a great patriot and follower of Christ

It is likely that many in the patriot community know by now that Dr. Greg Dixon, a great patriot and church leader, passed away on October 22, 2019. We at LWRN mourn the passing of this great patriot, and thank God for his leadership.

Dr. Dixon was a leader in the free church movement, working with the Unregistered Baptist Fellowship, and encouraged pastors to join Liberty Works Radio Network, which he also personally supported. LWRN broadcasts pastoral messages all day Sunday, and readers are encouraged to listen for real insight into God's Word and current events.

Dr. Dixon helped to found the Indianapolis Baptist Temple, and he served as lead pastor of that church from 1955 through 1996. In the 1970s, this church became the 11th largest church in America, and ran a Christian school of 700 students.

Under Dr. Dixon's direction, IBT did not withhold taxes from staff and pastors of the church. Despite the fact that many staff paid those taxes to the IRS when they filed returns, the IRS alleged that IBT had failed to pay taxes. After a long court battle and a 92-day siege of the church, federal Marshals, in the first month of the Bush administration, seized church property for the payment of those alleged taxes in 2001.

"The only way we are going to escape from being a total police state is to stand up for our constitutional rights," said Dr. Dixon. His son, the current pastor of IBT, called Dr. Dixon a "battler and builder." America needs many more builders and battlers with the patriotic fervor, integrity, and desire to follow Christ that Dr. Dixon exemplified.