Bound By Oath | Season 2 | Episode 8: Persons Who Are Not "Persons"

John: Hello and welcome to Episode 8 of Season 2 of Bound By Oath. On this episode, we're going to take on the most absolute immunity of them all, absolute immunity. You cannot sue legislators for legislating, or judges for judging, or prosecutors for prosecuting, or police for perjury, and more. In a whole bunch of scenarios, no matter how maliciously or corruptly a government official acts, no matter how grave the consequences for their victim, no matter how clear the constitutional violation, that official is absolutely immune from civil liability.

> **Justice O'Connor**: Judges are absolutely immune for their acts of adjudication.

> **Carl Rachlin**: The majority decision was based upon what was considered to be the ancient immunity of legislators.

John: On this episode, we're going to talk about two kinds of officials who get absolute immunity: judges and legislators.

> **Justice White**: Historically … English and Unites States judges have not been subject to suits for damages for judicial acts within their jurisdiction.

> **Lawyer**: Legislative immunity protects legislators from suits that attempt to interfere with their speeches and debates --
> **Justice Stewart**: Also, a state legislature might not be a person within the meaning of 1983.

John: On a later episode, we'll talk about absolute immunity for prosecutors and other kinds of officials.

> **Solicitor General Bork**: For these reasons, we think the absolute immunity which ... a judge has … properly belongs to a prosecutor as well.

Margaret Johns: That's just baloney.

John: On that later episode and this one, we'll mostly talk about absolute immunity from Section 1983 claims, which of course only apply to state and local officials. But federal prosecutors, judges, etc. also enjoy absolute immunity and with the same justifications, which I humbly request that you keep in mind even though we're not going to talk about caselaw involving federal officials all that much. If this is the first episode of Bound By Oath that you are listening to, please back up and start with Episode 1, which is entitled They're Going to Kill This Man.

BBO Montage

John: On Episode 5, we talked about the 1961 case of *Monroe v. Pape*, which revived Section 1983 after almost 100 years of disuse. But *Monroe* was not the first big Section 1983 case that the Supreme Court decided. That distinction goes to the case of *Tenney v. Brandhove*, which was decided 10 years earlier in 1951. And unlike *Monroe v. Pape*, when the Supreme Court began to say when officials could be sued for violating the Constitution, in *Tenney v. Brandhove* the Court began to say when they couldn't.

Sheldon Nahmod: This is really the first major Supreme Court decision to deal with the interpretation of Section 1983.

John: That's Professor Sheldon Nahmod of the Chicago-Kent College of Law. We lifted the title of this episode, Persons Who Are Not "Persons" from an article of Prof. Nahmod's, which you can find on this episode's webpage and which we hope you'll take a look at.

Sheldon Nahmod: It did arise in the context of anti-communism, post-Second World War when the nation was perhaps appropriately concerned about the rise of communism and possible infiltration of the US government. Not only was communism being investigated at the national level, but different states were engaged in various anti-communist investigations.

John: *Tenney v. Brandhove* involved an avowed Communist named William Brandhove who was summoned to appear before a committee of California legislators.

Sheldon Nahmod: The plaintiff was called before a California legislative committee and asked about communist affiliation, association, beliefs, and the like. And he sued under Section 1983, alleging that calling him before legislative investigative committee violated his First Amendment rights and the investigation was primarily intended to harass him, to send a message, to hurt him, and destroy his reputation.

John: The suit asked for individual California state legislators to be held personally liable. And the U.S. Court of Appeals for the Ninth Circuit said just looking at the facts as alleged in the complaint, this case can proceed. There may or may not be a constitutional violation, but that's a question for a later day. The Supreme Court reversed.

Sheldon Nahmod: And Felix Frankfurter wrote the opinion for the Court and gave us an approach to Section 1983 interpretation which continues to this day.

John: Justice Frankfurter, writing for a nearly unanimous Court, said that even though the language of 1983 says that “every person, who causes the deprivation of rights, shall be liable” state legislators, despite being persons, are excluded from that provision. And his reasoning was that in 1871 there were well-established common law rules that shielded certain kinds of officials doing certain kinds of things from liability. And one kind of official who couldn’t be sued at common law were legislators.

Sheldon Nahmod: What Frankfurter for the Court is saying in *Tenney*, is that the democratic decision making processes -- legislating -- is such a very important aspect of our democracy that we don't want that activity to be chilled.

John: One motivation -- if not the motivation -- for granting absolute immunity to legislators and all the other kinds of officials we’re going to be talking about is to relieve them of the burden of litigation. Not just the possibility of paying damages if they lose, but just spending time defending lawsuits.

Sheldon Nahmod: One of the arguments when one talks about absolute immunity -- given that everybody recognizes there are constitutional harms that will not be remedied -- one of the questions is, are there other ways of dealing with a legislator who is not Constitution-compliant?

John: In *Tenney*, the Supreme Court said there is another remedy for legislators who don’t comply with the Constitution.

Sheldon Nahmod: Vote the scoundrels out. Vote the scoundrels out.

John: And the Court said that when a legislator is legislating they get absolute immunity. Importantly, it's the activity of legislating that gets immunity, so a legislator *can* be held liable for non-legislative acts like sexually harassing or wrongfully firing a member of their staff. In *Tenney*, the Court said holding an investigative hearing is legislative and therefore protected, even if, in the words of the dissent, the hearings are quote "kangaroo courts" where people are essentially put on trial and blacklisted for their political beliefs.

Sheldon Nahmod: Pretty clearly having an investigation is legislative in nature. It's certainly necessary before you can enact legislation. We don't want that interfered with at all. And we want to give these legislators, through absolute immunity, the opportunity to get out from under, as quickly as possible, a damages liability claim. Frankfurter does talk about what the draftsman of Section 1983 must have intended in 1871. And he said they wouldn't have -- absent clear evidence -- intended to preclude the relevance, possible applicability of legislator immunity. Since it was so well entrenched -- both at the both at the federal level and at the state level -- then Congress would have said something explicit about overriding it when it enacted Section 1983.

John: We talked about this approach to interpreting Section 1983 on Episode 6. In 1967, in the case of *Pierson v. Ray*, the Supreme Court said police officers would be immune from 1983 suits, with some qualifications, because they would have been immune at common law -- and Section 1983 was not intended to override the common law. Of course, we argued that the Court didn't get that one right. There was no immunity in the 19th century for police or most other officials. But when it comes it legislators, there was immunity from suit at common law. And in *Tenney*, the Supreme Court said that if Section 1983 was meant to change that, the drafters of Section 1983 would have been a lot more clear about it. Only one justice dissented.

Sheldon Nahmod: Justice Douglas, who dissented in *Tenney* and who dissented at least in part in *Pierson v. Ray*, what he was saying was the following: that Section 1983's language is incredibly broad in scope. And on its face, it does not provide for any immunities at all. And that's how we should interpret section 1983.

John: According to Justice Douglas, and Justice Douglas alone, every person means every person.

Sheldon Nahmod: And moreover when you look at the history of Section 1983 -- what was going on in this country in 1871 and earlier -- you had state and local judges, you had state and local legislators who were engaged in vicious acts of racial discrimination. And he said: look at what the draftsmen of Section 1983 were dealing with. They must have intended to subject those folks to damages liability personally as a way of providing incentives for litigants to sue for constitutional deprivations.

John: So there are two main points we're going to come back to again and again on this episode and on our next episode about prosecutorial immunity: One is Justice Douglas' argument that every person means every person. The remedies provided in the common law had proven virtually meaningless in the face of Klan violence and the complicity of state officials -- like judges, prosecutors, and legislators -- in that violence. Section 1983 was meant to provide a new remedy and, in Justice Douglas' view, of course it would override common law norms and traditions. But that argument has never commanded a majority on the Supreme Court. Which brings us to the second point. If indeed courts are going to follow Justice Frankfurter's approach and look to the common law when interpreting Section 1983, have they done a particularly good job of it?

James Pfander: There are a couple of situations in which government officials were accorded absolute immunity from suit at common law.

John: That's Professor James Pfander of Northwestern University. You may remember him from Episodes 1 and 2 where he explained that, for the most part, government officials in the 19th century were not protected by any kind of immunity. But there were exceptions.

Jim Pfander: So who received absolute immunity at common law? The legislator received an absolute immunity from common law. Which meant that you couldn't sue the legislator for damages if the legislator voted in favor of a statute that ultimately was said to violate your rights in some way. But that didn't mean that you were left without a remedy.

John: If the legislature passed an unconstitutional law, the proper party to sue was the tax official, the sheriff, or some other executive branch official in charge of executing the law.

Jim Pfander: You brought the action against the party, the executive branch officer, who enforced that statute against you. And so you could sue for damages and the immunity of the legislator didn't deprive you of a remedy. It simply directed you to sue the executive branch officials who carried the statute into effect.

John: The function of absolute legislative immunity at common law was to channel litigation to what was considered to be the proper defendant, while still ensuring that victims were compensated.

Jim Pfander: The same was true with respect to judges. So if you were a judge of a superior court, you were entitled to absolute immunity from suit. And that means that even if you got it

very, very wrong in a judicial decision, you couldn't be sued for money damages. And why is that? Because the party in question had other remedies available. The party in question could prosecute an appeal from the decision of the superior court judge and seek review of that grievous mistake by a superior court. So you didn't need to sue the judge himself or herself because you had other remedies available to you.

John: But in cases where you couldn't appeal, absolute judicial immunity might not kick in.

Jim Pfander: The only parties entitled to judicial immunity were the judges of superior courts. And that meant lots of other people who thought of themselves as judges didn't enjoy any immunity from suit at all. And I'm thinking here of like justices of the peace.

John: Justices of the peace at common law were, in Professor Pfander's words, the work horses of American adjudication. During the 18th and 19th centuries, justices of the peace resolved all kinds of disputes between litigants at the local level, and they also handled a range of legislative and administrative chores, like naturalization applications, estate administration, and pension claims.

Jim Pfander: They did a lot of judging, but they were not entitled to any immunity from suit. Now, why is that? One answer is that in many instances the actions of the justice of the peace were not subject to direct appellate review in the superior courts of the state in question. So the only way to facilitate review of the justice of the peace determination was to allow the suit to go forward against the board or the commission or the justice of the peace or whatever. So one can see the application of the doctrine of judicial immunity in the 19th century as driven by this imperative: we've got to find a vehicle for the vindication of the rights of the individual. And if an

individual has been mistreated by the justice of the peace and there's no appellate review available, then a lawsuit against the justice of the peace makes sense.

John: So jumping forward to 1951 in *Tenney v. Brandhove*, it seems like the Supreme Court was consistent with the common law when it ruled that California legislators couldn't be sued for holding an investigative hearing. Even if a plaintiff in a case like that couldn't sue a legislator, there would at least be an option to sue an executive branch official for redress from any kind of injury from an enforcement action. But when it comes to absolute judicial immunity, the story is murkier. The Supreme Court announced that judges would also be absolutely immune from liability under Section 1983 in the case of *Pierson v. Ray*. We talked about *Pierson* on Episode 6. That's the case where police officers in Jackson, Mississippi arrested -- and a local judge convicted -- a group of civil rights activists who entered a segregated bus station.

> **Carl Rachlin**: And we say the record reflects ... that they were convicted because that sign outside the bus station said that anyone who entered that bus station who was Negro was in violation of the law. Because that sign said, "White Only by order of the police."

John: *Pierson v. Ray* is famous because that's the decision where the Court invented qualified immunity. Without citing any cases from the 19th-century, the Court said that officials like police were generally entitled to immunity at common law if they were acting in good faith. But the civil rights activists in *Pierson* didn't just sue the police. They also sued a local judge who had convicted them of disorderly conduct and sentenced them to the maximum: fourth months in jail and a fine. On appeal, a different judge threw those convictions out.

> **Carl Rachlin**: On the first appellate level, the judge who tried the case, dismissed on the prosecution's evidence because he said there was no evidence to show a violation of a statute.

John: At common law then, they might not have had a claim against the judge. Because they had been able to appeal their sentences. But they argued that what the judge in Mississippi had done was precisely the thing Congress was trying to address with Section 1983.

> **Carl Rachlin**: The very kind of conduct that is concerned in this case is the kind of conduct the 1871 Congress was concerned about. They were concerned about the phony justice, the sham justice, the police who arrest and the judges who convict when there was no evidence of any wrongdoing.

John: In the 1860s and in the 1960s, people who advocated for equal treatment of white and black citizens faced retaliation from state and local officials, including by judges.

> **Carl Rachlin**: We are contending your honor that the judge here ... convicted, and deprived the petitioners of rights, privileges, immunities, etc, for the sole purpose of enforcing the segregation laws, customs, policies and usages of the state of Mississippi.

John: But the Supreme Court said too bad. And it followed the doctrinal template laid out by Justice Frankfurter in *Tenney*. It ruled that since judges were entitled to absolute immunity at common law, they would be under Section 1983 as well. However, it turns out absolute immunity for judges at common law was not quite so absolute as it has become today.

Elizabeth Watkins Hulen Grayson: I would agree with counsel that if there was proof that a judge was actually corrupt that then a judge could be liable.

John: That's the lawyer for the judge in *Pierson* who convicted the activists. And she argued that to win her case, the judge in Mississippi didn't need absolute immunity.

Elizabeth Watkins Hulen Grayson: So we don't even need absolute immunity in this case. … because there was no testimony in this record whatsoever that the judge had … any corrupt intent. … There wasn't any evidence of anything except the judge giving his best judgment.

John: She said, of course, that she'd be happy if the Court granted absolute immunity to her client. But she argued that if the justices didn't want to go that far, and if they wanted to leave open the possibility that a judge could be sued for being corrupt or malicious, well, that would be fine too. Because her client wasn't corrupt or malicious. Now why would she concede that? If judges were absolutely immune at common law, why open the door to liability?

Justice White: And you suggest that ... the common law made an exception to that immunity in cases of the corrupt judge?

Elizabeth Watkins Hulen Grayson: I think that it did.

John: Before the passage of Section 1983, judges could be held liable for acts that were corrupt or malicious -- at least in some states -- and even if appellate review was available.

Jeffrey Shaman: In the early days of the United States, the state courts had been rather split about whether judges should enjoy absolute immunity or not.

John: That's Jeffrey Shaman, who is a professor emeritus at DePaul University's College of Law.

Jeffrey Shaman: There are different rulings in different states that go in opposite ways.

John: As of 1871, six states allowed judges to be sued for damages if they acted maliciously or corruptly. In 13 states, judges were immune no matter what. And in another 18 states, it wasn't clear one way or another. Which is a point we'll come back to. But first, we're going to take a minute and talk about the origins of judicial immunity, which start in England.

Jeffrey Shaman: Judicial immunity is deeply rooted in the English common law. And there's kind of an interesting history to judicial immunity that goes all the way back to the year 1607 and the case of *Floyd versus Barker*, in which the esteemed English jurist Lord Coke ruled that a judge who'd been brought before the Star Chamber on the charge of conspiracy had absolute immunity from liability.

John: *Floyd v. Barker* is sometimes cited as the foundation of the doctrine of judicial immunity in America. In the case, a common-law judge who had displeased the King in the way that he had handled a murder trial was taken to the Star Chamber, which was a separate legal system from England's common law courts where any semblance of fair procedure was entirely lacking and where the King's enemies could be punished. But in *Floyd v. Barker*, Lord Coke pushed back against royal prerogative and ruled that judges were immune from prosecution even in the Star Chamber. The King could discipline the judge in various ways, but he couldn't have him criminally prosecuted. And in so ruling, Lord Coke enunciated justifications for judicial immunity that are still relied upon today, namely, the big one: judicial independence.

Jeffrey Shaman: Protecting judicial independence, that's an extremely important a goal. And I think today it's recognized that the most important purpose of judicial immunity is to protect judicial independence. As the Supreme Court has pointed out, judges often are called upon to decide controversial, difficult and emotion-laden cases. And they should not have to fear that disgruntled litigants will hound them with litigation, charging improper judicial conduct.

John: Of course, the judicial independence in *Floyd v. Barker* was about inoculating judges from the awesome power of the King, as opposed to today which is about inoculating judges from the not-awesome power of regular people. Be that as it may, *Floyd v. Barker* is a milestone, and fast forwarding a couple centuries, the Supreme Court cited it, in what is now the leading case about judicial immunity in American law.

Jeffrey Shaman: In a case entitled *Bradley versus Fisher*, the United States Supreme Court cited *Floyd versus Barker* when the Supreme Court granted absolute immunity to a judge who had been sued for malicious behavior against an attorney. In that case, in *Bradley versus Fisher*, the Supreme Court said that judicial immunity has been the settled doctrine of the English courts for many centuries. Now, what's interesting about that statement is that it's probably wrong. In other words, despite Lord Coke's ruling and *Floyd vs. Barker*, many historians believe that under early English common law, judges were generally liable for their wrongful acts and judicial immunity was the exception and not the rule.

John: Absolute judicial immunity may be old, but it really wasn't as well-settled a doctrine as the Supreme Court made it out to be in *Bradley v. Fisher*.

Jeffrey Shaman: The Supreme Court in *Bradley versus Fisher* decided in 1872 says, well, the state of the law up to now was that absolute judicial immunity was well established and uniformly followed. But again, the Supreme Court was inaccurate. It was misreading the law -- not only the English common law, but also the state court rulings.

John: The incident that gave rise to *Bradley v. Fisher* was a lawyer suing a judge who had disbarred him. But the incident that gave rise to that incident is of more than passing historical interest. So I hope you don't mind if we digress briefly. Because the incident that gave rise to *Bradley v. Fisher* was none other than the assassination of President Lincoln. Bradley was a defense attorney representing a former Confederate spy named John Surratt Jr., who had conspired at length with John Wilkes Booth and who had participated in a failed attempt to kidnap the president. However, a month later, when was Lincoln was assassinated, John Surratt Jr. was hundreds of miles away on a different mission: scouting out the possibility of breaking Confederate soldiers out of a prison camp in New York. When news of the assassination reached him, he fled to Europe and joined the papal army. But he was recognized and eventually captured in Egypt. In the meantime, his mother, Mary Surratt, was convicted for her role in the assassination and became the first woman ever executed by the federal government. At his criminal trial though, Surratt Jr. produced witnesses who said he'd been in New York at the time of the assassination, and the jury ultimately couldn't reach a unanimous verdict. He wasn't re-tried, and so he was a free man. But during the trial, his lawyer, Bradley, got into a bit of spat with the Judge, Fisher. Bradley said that Judge Fisher had insulted him repeatedly. The judge said he'd done no such thing and that Bradley had quote "threatened him with personal chastisement." As a result, the judge ordered Bradley disbarred from not only his court, the criminal court of the district, but also the Supreme Court of the District of Columbia, which by the way no longer exists. So Bradley sued and argued that Judge Fisher didn't have the power to disbar him from the D.C. Supreme Court because that was an entirely different court. And

Bradley's suit made it all the way to the U.S. Supreme Court, which agreed with Bradley and dismissed the disbarment order. But then Bradley turned around and filed a second lawsuit -- this time asking for damages against Judge Fisher of close to half a million dollars in today's dollars. And once again, his suit made it to the U.S. Supreme Court. But this time, the justices weren't interested. Reading between the lines, it seems like the Court just didn't think Bradley had anything to complain about after being reinstated. And they used his own argument from the first lawsuit against him, ruling that since Judge Fisher never had the power to disbar Bradley from practicing at the D.C. Supreme Court in the first place, Bradley couldn't say that he actually did disbar him and get damages on that basis. And if that's all the Court had ruled, *Bradley v. Fisher* wouldn't be an important case at all. It wouldn't really even be a case about judicial immunity. It would be about a claim that didn't have merit, not whether claims that did have merit couldn't be brought. But the Supreme Court went further and said: not only can this disgruntled lawyer not sue a judge, but pretty much no one can. And the Court used the case as an opportunity to announce a two-part test for when a judge would be protected by absolute immunity that is more or less the same test that's in use today.

Jeffrey Shaman: Judicial immunity only covers acts that a judge takes as part of his judicial capacity. So making rulings in cases would be the typical example of a judicial act.

John: Making rulings, issuing warrants, setting bond amounts, disciplining attorneys -- anything a normal person would normally expect a judge would do, no matter how wrongly they do it -- those are judicial acts that get immunity. However, the line that divides judicial acts from non-judicial acts can be pretty blurry. For instance, in 1988, in the case of *Forrester v. White*, the Supreme Court resolved a circuit split in the lower courts and announced that certain administrative tasks would not be covered by judicial immunity.

Jeffrey Shaman: Judicial immunity does not cover administrative acts on the part of judges. And a typical example of an administrative act that a judge performs would be hiring and firing of court employees. If a judge engages in racial discrimination or gender discrimination in hiring or firing someone that is not protected by judicial immunity.

John: Another kind of non-judicial act is conduct that is highly aberrational -- something no one would expect a judge to do. For example, in 1982, in the case of *Brewer v. Blackwell*, the U.S. Court of Appeals for the Fifth Circuit confronted a situation where a judge had engaged in a vehicle pursuit and arrest of a teenager he suspected of dumping garbage instead of yard waste at a landfill. After chasing down the teen, the judge took him to his home-office where he then allegedly conducted a trial and found the teen guilty. The Fifth Circuit said vehicle chases and impromptu trials at home were non-judicial acts, so there was no judicial immunity. But in other cases, courts have been willing to tolerate some pretty aberrational behavior. In the case of *Mireles v. Waco*, decided by the Supreme Court in 1991, the Court summarily reversed -- without argument and without briefing -- the denial of immunity to a judge who allegedly ordered police officers to use excessive force on an attorney. The attorney was dragged from one courtroom to another and smashed into doors and gates along the way. But the Supreme Court said ordering parties to be brought into court is a judicial act, no matter if you might not expect a judge to tell officers to rough someone up while they're doing it. That said, and this brings us to the second part of the test announced in *Bradley v. Fisher*, there are some judicial acts for which a judge can be held liable.

Jeffrey Shaman: If a judge does something clearly beyond his or her jurisdiction, that is not covered by judicial immunity.

John: In *Bradley v. Fisher*, the Supreme Court said that a judge could also lose immunity if they acted in the clear absence of all jurisdiction. And it gave the example of a probate judge, whose job is to handle wills and trusts, adjudicating a criminal case. That wouldn't get immunity.

Jeffrey Shaman: Other examples of that in cases that have actually happened are where a judge takes jurisdiction in a case over some action that occurred beyond the territorial jurisdiction of the judge and that clearly is beyond a judge's jurisdiction, and therefore they don't enjoy immunity for those acts.

John: Nevertheless, that is an extremely forgiving standard, which the Court in *Bradley* made clear with another example. It said: Imagine a judge who has criminal jurisdiction and that judge allows for the arrest, trial, and conviction of someone based on conduct that is not against the law. That judge would be immune from civil liability. There may not have been jurisdiction, but there wasn't a clear complete and total absence of all jurisdiction. Also in *Bradley v. Fisher*, the Court expounded on some of the reasons why that forgiving standard is good policy. Quote:

> ***Bradley v. Fisher***: It "is not for the protection or benefit of a malicious or corrupt judge, but 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."

John: The Court said that if anyone can drag a judge into court for malicious or corrupt conduct, then every disgruntled litigant is just going to allege maliciousness or corruption. Because it's the easiest thing in the world to just say those words in the complaint. Quote:

> ***Bradley v. Fisher***: “Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.”

John: And just to be clear, *Bradley v. Fisher* was not a Section 1983 case. But after the Supreme Court decided that Section 1983 had to interpreted in light of common law norms around 1871, *Bradley v. Fisher*, which was argued just a few months after Section 1983 was passed, became a powerful statement on what those norms were. And its holding that even malicious or corrupt judges were immune is frequently cited. But as Professor Shaman said, the Supreme Court didn’t get that right. Courts in six states had held judges could be held liable if they acted maliciously or corruptly. Interestingly, none of the judges who were being sued in those cases were actually held liable; the courts just held that judges *could* be held liable in a different case than the ones before them. So as far as I know, you won’t actually find any 19th-century cases holding a judge liable. But then again, in leaving the door open for liability, that does seem like a pretty clear rejection of absolute judicial immunity. Nevertheless, in *Bradley v. Fisher*, the Supreme Court said otherwise and -- fast forwarding again -- to the case of *Pierson v. Ray* in 1967, the Supreme Court, relying on *Bradley v. Fisher*, ruled that common law immunities for judges were well-established and uniformly followed.

Jeffrey Shaman: The Supreme Court's discussion of judicial immunity in Section 1983 in *Pierson vs. Ray*, is relatively brief. The Court begins by saying that few doctrines -- and it’s referring to judicial immunity -- were more solidly established at at common law.

John: But then there’s this other question: who cares what the common law said if indeed Section 1983 was meant to override the common law?

Jeffrey Shaman: Now, it seems to me that the Court's reasoning in *Pierson versus Ray* ignores some very salient facts about the enactment of Section 1983. First of all, Section 1983 was modeled on a provision in prior legislation the 1866 Civil Rights Act.

John: As we talked about on Episode 4, what Section 1983 did was create civil liability for actions that were already criminal. And the law that had made those actions criminal was the Civil Rights Act of 1866.

Jeffrey Shaman: And the language in Section 1983 is virtually identical to the language in this prior legislation, the 1866 Civil Rights Act, which imposed criminal liability on judges who deprived any person of their civil rights.

John: Which is precisely what the petitioners argued in *Pierson v. Ray*.

> **Carl Rachlin**: It was clearly the intention of the 1871 and the 1866 Congresses in passing these two complementary statutes ... clearly unmistakably intended to include judges.

John: After the passage of the Civil Rights Act of 1866, the federal government prosecuted state judges for violations of civil rights -- most often, according to Professor Robert Kaczorowski of the Fordham University School of Law, for refusing to allow the testimony of black witnesses in court -- testimony that was often essential for prosecuting Klan violence and other outrages.

Jeffrey Shaman: So or to put it in another way: The previous legislation and Section 1983 are complementary. One abrogates judicial immunity in cases where of criminal liability of judges

and the other abrogates judicial immunity from civil liability. So they're meant to operate in tandem or as complements to each other.

John: Prior to the Civil Rights Act of 1866, judges had enjoyed absolute immunity from criminal prosecution at common law for the same reason they enjoyed immunity from civil liability: judicial independence. Judges who made honest mistakes or made unpopular rulings shouldn't be harassed with criminal prosecution. But in 1866 that common law rule was unquestionably abrogated and remains so today. So you would think when Congress passed virtually identical language in 1871 that would have stripped judges of immunity from civil liability as well.

Jeffrey Shaman: So it's understood that the prior legislation does away with judicial immunity, and therefore, you would think that Section 1983 now also does away with judicial immunity and causes of action brought under that statute. But of course, the Supreme Court in this very brief discussion just ignored that sort of reasoning. In addition to that, there are a number of statements in the legislative record, indicating that Congress did intend to withdraw judicial immunity when it came to Section 1983 causes of action, at least in cases where judges acted with malice or in reckless disregard of the civil rights of an individual.

John: In his dissenting opinion in *Pierson v. Ray*, Justice Douglas cited the remarks of a congressman from South Carolina, Joseph Rainey -- who was coincidentally the first African American to serve in the House. Rainey said that courts in the former slave states were quote: "in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." Meanwhile opponents of Section 1983 also said that, if it were enacted, judges would be liable. For instance, according to a congressman from Kentucky, quote: "every judge in the State court . . . will enter upon and pursue the call of official duty with the sword of Damocles suspended over him." But Justice Douglas dissented alone. The rest of

the Court said that when you're interpreting Section 1983, it's less important to look at the problems Congress was trying to address in 1871 than it is to hew to common law traditions -- traditions that left people defenseless against state officials who would not arrest or convict Klansmen but who would use the law to harass people like the plaintiffs in *Pierson v. Ray*.

Jeffrey Shaman: So there's a lot to criticize about the Court's very short, very cursory majority opinion in *Pierson v. Ray*.

John: And in the years since *Pierson v. Ray*, the doctrine of absolute judicial immunity, if anything, has become more ironclad. As we said, judges are not entitled to judicial immunity for non-judicial acts and for acts where all jurisdiction is clearly lacking. In 1978, the Supreme Court would make clear, however, just how forgiving that standard really is.

> **Justice White**: This case ... arose when a mother determined that her minor daughter should be sterilized and presented to a state court judge a petition for an order authorizing such an operation.

John: That's Justice White, announcing the Supreme Court's decision in the case of *Stump v. Sparkman*. In the case, a mother petitioned a judge in Indiana to have her 15-year-old daughter permanently sterilized. She told him her daughter was sexually active and also slightly retarded, the latter of which wasn't true.

> **Justice White**: There was no notice to the daughter and no guardian ad litem was appointed. The operation was then performed, the daughter not then being informed of the real nature of this surgery.

John: The judge did not appoint the counsel for the teenager. She received no notice of the hearing or of the judge's order. She went to the hospital believing her appendix was going to be removed.

> **Justice White**: When she later married and learned the condition, she brought suit to the United States district court against all those responsible including the judge.

John: She sued judge, the hospital, and the doctors, but all her of claims were dismissed except for her 1983 claims against the judge. And even though her only possibility of a remedy was a suit for damages against the judge, the Supreme Court said he was immune from suit.

> **Justice White**: He is not liable for damages under section 1983 even if he was mistaken in his construction of the state law in his act of approving the petition.

John: There was no law in Indiana authorizing the sterilization of minors. The judge just kind of went rogue. Nevertheless, since signing orders is something judges routinely do, the Court said the order in this case was a judicial act. And the Court ruled there wasn't a complete absence of jurisdiction because at the time prisoners in Indiana could be sterilized, though the law required that they receive notice, a hearing, and an opportunity to appeal. Three justices dissented.

> **Justice Stewart**: A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity.

John: That is Justice Stewart.

> **Justice Stewart**: And I think what Judge Stump did … was beyond the pale of anything that could sensibly be called a judicial act.

John: In Justice Stewart's view, the Court in *Stump v. Sparkman* went beyond what it had held in *Bradley v. Fisher* and *Pierson v. Ray*. In both of those previous cases, the plaintiffs could appeal the decision of the judge that they took issue with. But in *Stump v. Sparkman*, once the surgery was performed, there was nothing for the plaintiff to appeal.

> **Justice Stewart**: There was and there could be no appeal.

John: If the Supreme Court was really serious about following the common law, it could open the door just a crack to lawsuits against malicious or corrupt judges. That door was open in the 19th century. Or if not that, then it could at least take more care to ensure that in situations like *Stump v. Sparkman*, where there is no possibility of appeal and where there is no possible remedy for a constitutional violation except for a damages suit against a judge, that those suits are allowed to go forward. That would have been something courts took seriously in 19th century at common law. Here's Prof. Pfander again:

James Pfander: Judicial immunity is in some ways, an immunity that is created by judges for judges. And that is, I think, a fair criticism of judicial immunity. I'm sure judges are quite pleased that they enjoy a measure of judicial immunity from suit. And it may make the judges better capable of doing their hard job without the fear of financial accountability. I don't really have a problem with that as a general principle so long as the lines of appellate review are clear, and you're not just subject to the dictates of a potential renegade judge with no remedy available.

John: But after *Stump v. Sparkman*, we are subject to those dictates. And the other remedies available to people whose rights are violated by judges are not always sufficient. As we said, judges can be prosecuted. But that almost never happens. Judges are also subject to internal discipline. But that discipline usually ranges from nonexistent to extremely lax. According to an investigation by Reuters, state authorities disciplined over three thousand judges from 2008 to 2018 for misconduct. But the identities of those judges and the details of what they actually did were not disclosed to the public. And during about the same time period, over a thousand other judges resigned, retired, or were publicly disciplined after accusations of misconduct. But those figures are an undercount. The state agency in charge of judicial ethics in Illinois, for instance, refused to share basic data with Reuters -- though journalists did learn that the state lost hundreds of complaints against judges, which won't be investigated. But from the data journalists did get access to, they found that nationwide 9 out of 10 judges who committed misconduct were allowed to return to the bench. And some of the stuff they did was horrific. For instance, one judge in Alabama unlawfully jailed hundreds of people over unpaid traffic fines, including, for instance, a young mother whose daughters were abused in foster care during the 10 months she was in jail. A judge in Michigan ordered three children -- ages 9, 10, and 13 -- to be handcuffed when they refused to visit with their father. A judge in Arkansas coerced defendants into sex in exchange for leniency. So if your rights are violated by a judge, because of absolute judicial immunity, you had better hope there is someone else you can sue as well. For instance, last year, we at the Institute for Justice sued a judge in New Orleans.

> **News anchor**: It's not often a judge finds himself a defendant, but that's the case for a New Orleans criminal court judge who's now being sued. He's accused of steering court business to a company owned by his former law partner. Investigative reporter Mike Pearlstein breaks down the suit.

Reporter: Judges routinely order electronic monitoring. But the way criminal court judge Paul Bonin did it two years ago is now the focus of a federal lawsuit.

John: The judge, when he ordered defendants in his court to wear ankle monitors, steered them to use one particular company called ETOH.

Reporter: Co-owned by his former law partner and major campaign contributor.

John: According to one attorney who practiced before his court, the judge could be pretty insistent that defendants use ETOH and not one of the other ankle monitoring companies in the area.

Lawyer: I get an email from Judge Bonin saying that my client didn't get the monitoring device put on and that he was going to put out a warrant for my client's arrest.

Reporter: Smith said he told the judge that his client did have an ankle bracelet, just not from ETOH.

Lawyer: And the judge was coming out of the back. He sees me. He just goes ballistic. He starts screaming at me about he ordered me to use a specific company.

John: ETOH charges defendants an installation fee of $100 or more, and it charges defendants a $10 daily fee, which can be a significant hardship for the 85% of defendants who appear before the court who are indigent. And the judge refused to release people from ankle monitoring if they were unable to pay their fees – even if they were complying with every other condition of their release. He even conditioned release from jail not only on contracting with the company, but pre-paying its fees. And he threatened revocation of release and jailing simply for failure to pay the company.

Bill Maurer: The judge acted largely as a debt collector.

John: That is my colleague at the Institute for Justice, Senior Attorney Bill Maurer.

Bill Maurer: And it tainted the entire process. It calls into question all of the judge's decisions regarding this ankle monitoring company.

John: Last year, we sued the judge under Section 1983. And we argued that a judge steering defendants into debt to a company that he has personal and financial ties to violates due process because he is no longer a neutral decisionmaker. But we couldn't ask for damages.

Bill Maurer: The only remedy that you can get from a judge acting in his or her judicial capacity are prospective declaratory relief, meaning that you get a declaration from the court saying that what the judge did in the past was wrong, and that if they did it again, it would be either illegal or unconstitutional. Or if the judge violates that declaration in the future, you can get an injunction to get the judge to stop doing that thing. But there's really no other remedies available to defendants when a judge violates constitutional rights in the United States. And for this reason, it's very important that you're able to identify other actors within the criminal justice system who are participating in the violation of civil rights and sue them for appropriate remedies, including damages. Because otherwise these would be constitutional violations that go completely unremedied.

John: After we filed our complaint, the judge announced he would not seek reelection. Which meant he was out of the case, because our clients' only avenue of relief against him was for conduct he might have undertaken in the future. However:

Bill Maurer: The suit is continuing because we've sued the private ankle monitoring company that had the ties to the judge.

John: We're not asking for damages. We're seeking a return of the fees our clients paid to ETOH without any disclosure from the judge about his ties to the company. And we're seeking an order to cancel any outstanding debts that our clients may have.

Bill Maurer: As more and more private companies participate in our criminal justice system -- as the sort of the machineries of the criminal justice system are privatized -- that judges not have any ties that may implicate due process rights of defendants becomes absolutely critical.

John: And last fall, a federal district court said the suit against ETOH could proceed. ETOH may be a private company, but the court said they are acting under color of law. It's only a district court opinion, but it's still an important precedent because it's a relatively new phenomenon that defendants -- hundreds of thousands of them per year around the country -- are on the hook for fines and fees and surcharges to private companies for ankle monitoring, drug testing, breathalyzing, mental health services -- a whole range of things that can cripple people financially and that there's no way judges should be benefiting from. So maybe in our case there will be another party that can ultimately be held to account. But that's certainly not always true. For instance, last year there was the case of *Henry Hamilton versus the City of Hayti, Missouri*. It involved a judge who gave his clerk a rubber stamp with his signature, so that she could authorize arrest warrants and order defendants to pay cash bonds. And the clerk wasn't always as neutral and detached as the Constitution requires.

Lawyer for Hamilton: Hamilton was arrested on a complaint filed by a private individual.

John: That's the lawyer for Henry Hamilton, an elderly, disabled, African-American man who spent 7 days in jail after a woman in the small town of Hayti, Missouri accused him of throwing a pen at her that hit her in the arm.

> **Lawyer for Hamilton**: That complainant was the daughter of the municipal court clerk in which the charge was filed.

John: After Hamilton allegedly threw the pen, the woman called her boyfriend, who happened to be a police officer. Here's the other side's lawyer.

> **Lawyer for judge**: She called for a police officer to come.
> **CA8 Judge 1**: She called the police officer who happened to be her boyfriend?

John: She gave a statement to the officer and soon after she took a complaint down to the courthouse to the clerk.

> **Lawyer for judge**: She presented it to the clerk, which is her mother. And then --
> **CA8 Judge 1**: She presented it to her mother? [laughs]
> **Lawyer for judge**: Correct.
> **CA8 Judge 1**: And the mother called the judge?
> **Lawyer for judge**: For the warrant. Correct. … I'm not saying it's the greatest situation.

John: The clerk conferred with the judge and then filled out an arrest warrant for Mr. Hamilton and stamped it with the judge's signature. Which likely made the warrant invalid because it wasn't issued by a neutral and detached magistrate. Nevertheless, Hamilton was then arrested

and held on bond, which was also set by the clerk and which the clerk also rubber stamped with the judge's signature. Hamilton couldn't pay, and he spent 7 days in jail before he was allowed to see the judge and sentenced to time served for disturbing the peace. Which he maintains he was innocent of but only pled guilty to get out of jail. So Hamilton sued several parties. He filed a *Monell* claim under Section 1983 arguing that the city should be held liable because, among other things, it had an unconstitutional policy of setting bail without any inquiry into whether indigent people could afford to pay. But that got dismissed because the court ruled that wasn't a city policy. It was the judge's policy. And the fact city officials enforced that policy didn't mean the city was on the hook. But Hamilton also sued the judge. Here is Hamilton's lawyer again.

> **Lawyer for Hamilton**: The Supreme Court -- *Stump v. Sparkman* in particular -- points out that really what's important is that you have a case before you. A judge, like I say, cannot walk out on the street out here and say: I don't think that guy is doing what he ought to, arrest him.

John: He tried to distinguish the case from *Stump v. Sparkman*. But the Eighth Circuit didn't bite.

> **Judge 2**: I think you're going nowhere. Frankly, I don't -- the jurisdiction. Well, you can start there, but I don't see it.

John: Citing *Bradley v. Fisher* and *Stump v. Sparkman*, the Eighth Circuit ruled that issuing arrest warrants and setting bond are judicial acts.

Sheldon Nahmod: Is this a judicial act? Yeah, judges do this sort of thing all the time.

John: That's Professor Nahmod again.

Sheldon Nahmod: Even if the judge made a mistake by authorizing the clerk to do it in the judge's place. That's excess of jurisdiction and not the clear absence of jurisdiction. So therefore, even though it's borderline outrageous, it is erroneous, it is unconstitutional, there is no damages liability for the judge.

John: In addition, Hamilton also tried to sue the clerk. But the Eighth Circuit said he couldn't sue her either.

Sheldon Nahmod: To the extent that the clerk was instructed by the judge to do this, then that clerk partakes, if you will, of the protection of the judge's absolute judicial immunity, sometimes called therefore, quasi-judicial immunity.

John: That's a teaser for our next episode on absolute immunity. There are a host of government officials who are not judges but who are protected by judicial immunity -- or so-called quasi-judicial immunity. Like the clerk in this case. She may have violated the plaintiff's constitutional rights. But he won't get his day in court because she performed a judicial function, and so the judge's immunity flows to her.

Sheldon Nahmod: Now, my argument would be that at most qualified immunity should apply and not this quasi-judicial immunity.

John: Which is another point I have been meaning to bring up. All government officials are always protected by qualified immunity, except for the ones who get absolute immunity. For any

official who would ordinarily be entitled to absolute immunity -- if they lose that immunity by engaging in a non-judicial or a non-legislative act, then they are entitled to qualified immunity.

Sheldon Nahmod: Notice that the result might still be the same. Because it could be a factor in the qualified immunity determination that this is a kind of case of first impression. And the clerk -- there was no clearly set a law on this issue maybe, and therefore the clerk might still be protected by qualified immunity.

John: If there no was prior case saying court clerks can't rubber stamp arrest warrants, particularly in a case where a member of clerk's immediate family is the complainant, then the clerk very likely would get qualified immunity. Or take for instance the judge we talked about earlier who ordered the officers to use excessive force on a lawyer. If the Supreme Court had said he was not entitled to absolute immunity, the plaintiff would still have had to overcome qualified immunity. And if there were no prior case saying judges can't tell officers to rough someone up, he'd be just as immune from suit.

Conclusion

John: So that's our episode. In sum, there is good reason to be skeptical that the drafters of Section 1983 meant for the immunities that had existed at common law to continue to protect officials like judges from civil rights claims. Judges were violating civil rights left and right during Reconstruction, and Congress created a new form of liability to hold them accountable. So what would the world look like if judges could be sued for damages?

Sheldon Nahmod: Wouldn't be -- it wouldn't be good. It wouldn't be good. When judges act judicially, we have -- and I think this is probably the most powerful argument -- we have an appellate process.

John: Each scholar we talked to on this episode agreed that subjecting judges to lawsuits by disgruntled litigants could be a significant hardship.

John: If we get rid of absolute judicial immunity, everyone's just gonna file a complaint that alleges malicious behavior. And if those are the words you have to say in the complaint, then that's what you say. And so now every judge is defending a bunch of lawsuits.

Jeffrey Shaman: That certainly is something that cannot be dismissed easily. Because it is true, I think that you have a lot of disgruntled litigants who will want to file a lawsuit saying, as you point out, they might just put the magic words in their complaint. The judge acted with malice and reckless disregard of the Constitution or whatever. Now, a lot of those cases that don't have much merit will be dismissed very quickly. But still the judge will have to go out and hire an attorney. Now, maybe that can be taken care of by insurance. Lawyers have insurance for malpractice. Or maybe the judicial system, the judiciary can take a blanket insurance or can ensure that judges are provided attorneys to represent the judges in those cases. So I think that while we can't just readily dismiss out of hand this argument that we have to worry about judges having to go out and get representation, pay for, and defend themselves, there are ways to take care of that.

John: And that’s where we land as well. Judges might be deluged with litigation and that might not be in the public interest. But. If you could sue judges for damages, it seems like what would happen in the real world is that judges would not necessarily pay those judgments out of their

own pockets. Either insurers or the government would foot the bill, just like what happens now over 99 percent of the time when a police officer is found to have violated the Constitution. And as for the burden of just defending the lawsuits, well, police don't pay for their lawyers, and the same provision could be made for judges. Judges would still have to take some time to talk their lawyers, but as Professor Michelman suggested back on Episode 6, those burdens might not be as high as we imagine.

Scott Michelman: So what if the cop or the the presidential aide or other government official has to spend a few hours with the lawyers and sit for a deposition? That's sort of the cost of doing business I would say.

John: It may be we're worrying too much about the convenience of judges and not enough about people's constitutional rights. And coming back to a point that Dean Erwin Chemerinsky made on Episode 2 in the context of constitutional claims against federal officials:

Erwin Chemerinsky: I think what that wrongly does is put the efficiency of the government -- in avoiding having to defend lawsuits -- above the Constitution and the need to protect people's rights.

John: As it happens, for just a brief moment in time -- before the Supreme Court decided *Tenney v. Brandhove* and *Pierson v. Ray* -- lower courts were playing around with the idea that judges could be liable for civil rights violations. In 1945, in the case of *Picking v. Pennsylvania Railroad Company*, the Third Circuit said a Pennsylvania judge, who had allegedly extradited a couple to New York without following the proper procedures, could be sued under Section 1983. The court ruled that stripping judges of the immunity that they'd had at common law might be a really bad idea, but that's what Congress had done and the courts had to follow. Quote: "the

policy involved is for Congress and not for the courts." Of course, that holding wasn't long for this world. After the Supreme Court decided *Tenney* six years later, every lower court, including the Third Circuit itself, treated the *Picking* decision as bad law. So, it's a small sample size, but for six years it was open season on state judges in the Third Circuit. And how many suits were filed against judges that made it as far as generating a judicial opinion? We did as thorough a search as we could, and we found only one. And that plaintiff wasn't seeking damages. He just wanted an injunction ordering a New Jersey judge who was trying a criminal case against him to let him use defense lawyers from out of state that he preferred to the local bar. So one case in six years. Obviously, that was a long time ago and things could be different now for a variety of reasons. But when the floodgates were opened -- floodgates that judges had been warning against opening for centuries -- there wasn't much of a flood. We're going to come back to absolute immunity in a later episode, specifically the absolute immunities that are available to prosecutors, and to government officials who commit perjury, and also to other officials like social workers, probation officers, land use officials, members of occupational licensing boards, and more. But first, on Episode 9, we're going to take stock of where we are in this season and provide you with the latest updates on every single doctrine we have covered so far. There is a lot to talk about.

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