Who Are They to Judge? The Scope of Absolute Immunity as Applied to Parole Psychologists

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In September 2015, after twenty-six years of incarceration, Omar Sharrieff Gay attended a mandatory psychological interview as part of his parole proceedings. Such interviews formally serve as expert, objective assessments of incarcerated individuals' future risk of violence. But what transpired in Gay's interview was far from objective. Per court records, psychologists Amy Parsons and Gregory Goldstein asked Gay, "[W]hat particular ideology do you follow? Malcolm X? … Osama bin Laden?" and told him, "[W]e don't know if you are just another radical Islamic terrorist." The psychologists asked Gay to explain his religious beliefs and, after they were not satisfied with his response, painted a picture of Gay as easily indoctrinated and, therefore, violent. In their formal report, they wrote that Gay possessed "total commitment to whatever cause he sees fit in the future," which they argued "is a highly significant factor in Mr. Gay's future risk of violence."

Gay responded by filing suit under 42 U.S.C. § 1983, alleging civil rights violations and arguing that the "high risk of violence" finding in Parsons and Goldstein's report was motivated by racial and religious animus. In response, the psychologists claimed absolute immunity for their evaluations, arguing that their function in parole proceedings was "quasi-judicial" and, thus, that they ought to be afforded the same absolute immunity judges are granted for their decisions.

After years of serpentine procedural history, the Ninth Circuit issued a landmark ruling on the applicability of judicial immunity to parole board psychologists in *Gay v. Parsons* (9th Cir. 2023). The court held that parole board psychologists do not qualify for the absolute immunity granted to judges acting in their judicial capacities, breaking with a contrary Third Circuit holding.

This Case Note first provides a background on the doctrine of absolute immunity. It then evaluates the court's analysis in *Gay* and compares *Gay* with the Third Circuit's decision in *Williams v. Consovoy* (3d Cir. 2006). Finally, this Case Note argues that *Gay* is more consistent with Supreme Court precedent on absolute immunity

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and more in line with historical understandings of the doctrine. This issue has particularly high stakes, as psychologists' medical role can create a "guise of objectivity" (a phenomenon described by public defender Jeremy Isard in this Note). As a result, even a biased psychologist might still receive strong deference from a judge and could then be the reason a person spends the rest of their life in prison.

I. What Is Absolute Immunity?

Although qualified immunity has been the subject of much discussion in recent years, particularly in the context of police officers, courts grant judges an even more sweeping form of immunity called absolute immunity, shielding them from personal liability for their judicial acts. While qualified immunity allows suits when officials violate a "clearly established" statutory or constitutional right, absolute immunity offers no such exception.

Despite the fact that absolute immunity is often called "judicial immunity," courts have long extended it past judges. In Professor William Baude's article on "quasi-judicial immunity," he provides examples of acts for which officials were granted absolute immunity at common law, including notaries performing certifications and a town's trustees judging the completeness of a railroad project. The crucial factor for absolute immunity was the level of discretion and authority granted to the official; officials entrusted with what Baude called "the power to make determinations that were authoritative even if they were wrong," or "the power to make mistakes," were more likely to have immunity.

In the second half of the twentieth century, the Supreme Court issued several key decisions defining the outlines of absolute immunity as applied to various nonjudge actors. In *Butz v. Economou* (1978), the Court outlined its "functions" test, refusing to grant blanket immunity to Department of Agriculture officials but granting immunity to agency officials "performing adjudicatory functions... for their judicial acts." Justice Byron White wrote that if "all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen." But he continued to stress the importance of absolute immunity for judicial functions, writing, "[T]he risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women." These dueling concerns of accountability and neutrality prevail as themes throughout the case law.

Ten years later, in *Forrester v. White* (1988), the Court further expounded upon the "functions test" in evaluating an employment discrimination suit against a judge who claimed absolute immunity. The Court held that the judge was not entitled to immunity for his employment decisions because they were administrative, rather than judicial, acts. As Justice Sandra Day O'Connor explained, "[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." Therefore, no one person is guaranteed absolute immunity due to their job title, not even judges.

Two subsequent decisions, *Burns v. Reed* (1991) and *Antoine v. Byers Anderson* (1993), continued to refine the scope of absolute immunity. In *Burns*, the Court held that a state prosecutor was not immune from suit for giving legal advice to the police but was immune for court appearances and presentation of evidence. The defendant in the case argued that because absolute immunity extends to the decision to prosecute, it also extends to actions "related to the ultimate decision" of whether to prosecute. The Court rejected this argument, writing that this standard "proves too much, since almost any action by a prosecutor could be said to be in some way related to the ultimate decision whether to prosecute." Therefore, allowing immunity for giving legal advice to the police would open the door to an "expansive" understanding of immunity that would include both quasi-judicial and nonjudicial decisions made by a prosecutor. The Court further reasoned that prosecutors get immunity for their role as an advocate in judicial proceedings to "serve[ ] the policy of protecting the judicial process." But giving legal advice to the police is less transparent to potential claimants, and therefore the fears of "vexatious litigation" are lower while the risk of misconduct is higher.

Two years later, in *Antoine*, the Court denied absolute immunity to court reporters, holding that while they performed an essential function to the court's operations, court reporters' responsibilities are not "judicial acts." *Antoine* clearly articulated the rule that absolute immunity only applies when officials are "exercis[ing] a discretionary judgment" that is "functionally comparabl[e]" to that of a judge, mirroring the deciding factor under common law.

II. Applications of Absolute Immunity to Parole Board Psychologists

The existing circuit split on absolute immunity for parole psychologists results from diverging interpretations of the Court's "functional" test for absolute immunity. Underlying this disagreement may be differing intuitions about how judge-like psychologists are. Is

deciding whether someone poses a risk of violence a factual determination akin to a detective preparing a report (which would receive qualified immunity)? Or is it more like the parole board itself issuing a decision on an individual's eligibility for release (which would receive absolute immunity)?

In *Williams,* in 2003, the Third Circuit affirmed the lower court's grant of absolute immunity for parole psychologists. Williams, the petitioner, argued that his parole psychologist submitted misleading information to the parole board and was deliberately indifferent to his Eighth Amendment rights. The court referred to the "functions" test described by the Supreme Court but added its own interpretive gloss. According to the *Williams* court, "absolute immunity attaches to those who perform functions integral to the judicial process."

With this formulation, the Third Circuit construed the "functions" test to mean that any person who qualifies receives absolute immunity, not just for adjudicative acts but for all official acts. Therefore, the court did not have to determine whether the psychologist was receiving immunity for the specific actions in question, but instead, whether a parole psychologist is the type of role that would receive immunity generally. Additionally, in reading the Supreme Court's test to apply absolute immunity to anyone "who perform[s] functions integral to the judicial process," the court extended immunity beyond adjudicative acts. The court defined these "integral" functions as "investigative or evaluative functions at a governmental adjudicative entity's request to assist that entity," a notably broad category.

In applying this standard to the facts of the case, the court held that the psychologist "performed a function integral to the judicial process" and, therefore, acted as an "arm of the court" when evaluating Williams and presenting his findings to the court.

The Third Circuit also stressed a policy rationale for its decision. It wrote that "[c]ourts ... evaluate the effect that exposure to liability would have on an appropriate exercise of that function" when determining the extent to which a function is "integral to the judicial process." In doing so, the court inserted something like a balancing test into the "functional" test articulated by the Supreme Court. It then described absolute immunity as "[t]he only way to ensure unvarnished, objective evaluations from court-appointed professionals," declaring that that immunity must be granted "regardless of whether those evaluations are ultimately found dispositive ... or are ultimately found lacking."

Twenty years later, the Ninth Circuit became the second federal appellate court to weigh in on the matter. In *Gay*, as described above, the Ninth Circuit rejected the Third Circuit's formulation of the functional test. Citing *Forrester*'s reasoning that "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches," the Ninth Circuit's version of the functional test evaluates the specific acts for which an official is being sued before reaching a conclusion about immunity.

Further, rather than testing whether an official's function is "integral to the judicial process," the Ninth Circuit took the more limited view that only fundamentally adjudicative functions receive absolute immunity. The court quoted *Burns*, in which Justice Antonin Scalia (who concurred in the judgment in part and dissented in part) wrote that the "touchstone" of the doctrine is the "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." Therefore, while under the Third Circuit's view, performing an essential task at the behest of a judge is sufficient for immunity, under the Ninth Circuit's view, only acts that are inherently dispute-resolving or otherwise adjudicatory qualify.

The Ninth Circuit thus imposed two requirements for absolute immunity not employed by the Third Circuit: that the act itself (not the person's role) be examined and that the act is adjudicative. The court grounded its argument in the principles of judicial immunity, writing that when it "is extended to officials other than judges, it is because their judgments are 'functional[ly] comparab[le]' to those of judges—that is, because they, too, 'exercise a discretionary judgment' as a part of their function."

III. Parole Board Psychologists Should Not Receive Absolute Immunity

This circuit split raises several questions to resolve, as both courts drew upon the same precedent to make their determinations. But precedent, historical understandings of absolute immunity, and policy rationales all support the Ninth Circuit's conclusion: these psychologists should not receive absolute immunity for their assessments of an individual's risk of future violence.

A. The Ninth Circuit More Faithfully Applied Precedent

The Ninth Circuit expressly rebutted several of the Third Circuit's arguments. First, it wrote that the Third Circuit relied on *Burns*, not *Antoine*, and that *Antoine's* clearer articulation of the functional test should have been the controlling precedent as the most

recent decision on the matter. The Ninth Circuit wrote that *Antoine* better explained that the real question was whether "psychologists are exercising judge-like discretion in their evaluations to parole boards."

The Ninth Circuit also rejected the policy reasoning in *Williams*. The court reasoned that the burden was on the psychologists to prove that a lack of absolute immunity would lead to a flood of suits against psychologists and potentially impact their impartiality. But absent this evidence, "an abstract fear of vexatious litigation" is insufficient (*Antoine* used a similar rationale as applied to court reporters). Further, the Ninth Circuit noted that psychologists still have professional standards and licensing requirements, meaning they have incentives beyond legal liability to remain impartial in their professional assessments.

Beyond the Ninth Circuit's arguments, there are two additional reasons why the Third Circuit's understanding of the doctrine was flawed. First, the Third Circuit did not correctly apply *Burns*, and if it had, it would have reached the same result as if it had applied *Antoine*. The Third Circuit's framing of the "functions" test as "attach[ing] to those who perform functions integral to the judicial process" is not the standard that *Burns* provides. If it were, *Burns* would not have been decided in a way that granted absolute immunity to prosecutors for some acts but not others. *Burns*, like *Antoine*, evaluates each *act*, rather than each *actor*, to determine whether absolute immunity should apply.

Second, the policy standard that the Third Circuit read into *Burns*—that courts should "evaluate the effect that exposure to liability would have on an appropriate exercise of that function"—proves too much. While the fear of overwhelming litigation is often used as a justification for qualified immunity, courts should not extend absolute immunity on this basis. Allowing judges the discretion to consider chilling effects would justify the novel extension of immunity to a host of government officials. Every officer involved in the criminal justice system could plausibly be affected by their liability exposure, but such a standard gives free rein to judges to grant absolute immunity any time they deem that effect too strong. Further, these fears are unfounded. Qualified immunity still requires that the officer violate a "clearly established" constitutional right to bring suit and, therefore, already significantly limits the scope of potential suits. And indemnification also shields individual employees from the strongest chilling effects by preventing personal financial loss for these suits. For example, Texas indemnifies its government psychologists, excepting "willful and wanton misconduct."

B. The Ninth Circuit's Approach Is More Consistent with Historical Understandings of Judicial Immunity

Further, the Ninth Circuit's articulation of the principle is far more consistent with historical understandings of judicial immunity, which has been imported into modern-day understandings of immunity for § 1983 suits. Judicial immunity was established under common law to guarantee judicial independence. The fears of undermining independence were most prominent in the context of criminal trials; for instance, in the absence of immunity, a judge could face conspiracy charges for acquitting a defendant. The historical applications of this principle to nonjudges, as explained by Professor Baude, reflect that independence was also the core feature of "quasi-judicial" immunity. The relevant standard at common law was not merely that absolute immunity extended to any official with discretionary powers but that, specifically, those with the "power to make mistakes" were immune from liability. At the heart of this concept is the idea that official judgments should carry a finality that must be respected by the general public and that judicial liability, even for erroneous rulings, erodes the public trust.

For parole psychologists, these historical principles lie on shaky ground. The independence argument does not hold, as no one has granted parole psychologists the power to unilaterally make parole determinations. In other words, parole psychologists do not possess the "power to make mistakes" that officials traditionally receiving absolute immunity have. Their risk assessment report is designed to be one of many factors determining an individual's eligibility for parole. Doctors are fallible—outside the criminal context, individuals frequently receive second opinions.

C. Denying Immunity to Parole Psychologists Will Not Hinder Objective Medical Assessment

As for any fears the Third Circuit has that psychologists will no longer give their genuine assessment of a patient for fear of liability, there are two practical responses. First, there is no suggestion in the Ninth Circuit's decision that the psychologists will not be granted qualified immunity, which only imposes liability for violations of "clearly established" rights.

Second, if a psychologist's opinion is clouded by discriminatory motivations, there is no objective assessment in the first place. While constitutional and procedural safeguards aid in preserving judicial neutrality, there are far fewer of these protections in the context of parole risk assessments. Psychologists' assessments are performed

without the Sixth Amendment protections afforded those in judicial proceedings, such as a right to appointed counsel or a public trial. Additionally, judges write public opinions subject to scrutiny by both the public and appellate courts. They want to maintain their reputations (and some seek reelection). In contrast, risk assessments occur out of the public eye, similarly to the legal advice to the police in *Burns*. The Court in *Burns* highlighted that these private, day-to-day judgments by officers in the criminal justice system are not targets for "vexatious litigation" in the same way judicial decisions or a prosecutor's arguments in court would be.

IV. Conclusion

In *Burns*, the court quoted Judge Learned Hand's statement that in some cases, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." But both policymakers and the general public are beginning to reject this view, recognizing the endemic harms of official misconduct. Four states have banned qualified immunity as a defense for police officers, and the majority of the American public supports limiting qualified immunity. And while it does not expand individual liability for civil rights suits, California's Racial Justice Act provides alternate causes of action for challenging officials' racial bias. These developments suggest that there may also be an appetite for carefully curtailing absolute immunity's scope. A narrow reading of absolute immunity preserves judicial neutrality while ensuring that federal and state officials are held accountable for perpetuating discrimination and animus in their roles.

Parole psychologists and other mental health professionals have broad power to determine an incarcerated individual's chance at freedom, and their recommendations lack transparency. Absolute immunity gives these psychologists license to discriminate with impunity. *Gay* represents a good step forward, but other circuits should follow suit, and these holdings should be used as a building block in questioning absolute immunity for all mental health professionals in the criminal legal system. Fears that this will impede their neutrality are unfounded; these officials can still be afforded forms of qualified immunity granted to other officials. But no longer will brazen constitutional violations be acceptable.

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