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William P. Marshall

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# JUDICIAL ACCOUNTABILITY IN A TIME OF LEGAL REALISM

William P. Marshall<sup>†</sup>

Charles Geyh's article, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*,<sup>1</sup> makes an outstanding contribution to the growing literature on the subject of judicial independence. His taxonomy setting forth three categories of judicial accountability—institutional, behavioral, and decisional—is particularly insightful in helping us distinguish between relatively uncontroversial attempts to hold the judiciary accountable, such as efforts to improve judicial administration or actions against judges for personal ethical violations, and the more problematic challenges to judicial independence that arise when politicians attack judges for issuing decisions they do not like. One, therefore, is immediately tempted to congratulate Professor Geyh for accomplishing his announced purpose of “rescu[ing] judicial accountability from the realm of political rhetoric.”<sup>2</sup>

But a critical aspect of Professor Geyh's analysis deserves closer examination. In his discussion of decisional accountability, Geyh leaves open the possibility that judges can be sanctioned for certain improper judicial decisions. Specifically, he asserts that judges should be held accountable for willfully deciding cases wrongly. As he states, “It is hard to quarrel with the notion that judges should be accountable for intentional decision-making error: the judge who makes such errors has knowingly violated her oath of office, in which she swore to uphold the law.”<sup>3</sup>

Geyh is acutely aware that opening up the judiciary to sanction on grounds of legal error is risky business. On that account, he proposes that there should be a strong presumption against any finding that a judge's erroneous decision was willfully made. Borrowing from libel

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<sup>†</sup> Kenan Professor of Law, University of North Carolina School of Law.

<sup>1</sup> Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911 (2006).

<sup>2</sup> *Id.* at 914.

<sup>3</sup> *Id.* at 922 (citing 28 U.S.C. § 453 (2000)).

law, he suggests that a judge should not be found to have acted improperly unless it is shown, by clear and convincing evidence,<sup>4</sup> that the judge knowingly or recklessly reached an erroneous decision.<sup>5</sup> Having constructed the inquiry into judicial decisional malfeasance in this manner, he then suggests that few attempts to find intentional error by a judge are likely to be successful because the burden on those making the charge would be so onerous.<sup>6</sup>

Perhaps because I teach media law, I am skeptical of any approach that would use the defamation analog. Proving that a judge acted willfully or with reckless disregard would necessarily require a probing inquiry into the judge's subjective mental state that could itself threaten the values of judicial independence.<sup>7</sup> Moreover, as the economists have taught us, the knowledge and reckless disregard standard in libel law has turned out to be counterproductive. The primary motivation of most defamation plaintiffs is to make a point (regarding their own reputation and media fault) rather than to win damages<sup>8</sup> and if a similar motivation to make a political point is the one that compels most of those attacking judges (which I suspect it is), they are unlikely to be deterred by having to face a high threshold in order to prove their claim. Their goals are reached merely by the assertion of judicial misfeasance; they do not need further vindication through official sanction.

But there are also more fundamental issues raised by Professor Geyh's contention that judges may be held accountable for willfully issuing erroneous decisions. Two interrelated questions immediately arise. First, what does it mean for a judge to knowingly violate the law? Second, does it make sense to sanction a judge for intentionally reaching "erroneous" decisions in an intellectual climate dominated by the legal realist view<sup>9</sup> that law may be better understood as the subjective interpretations of the judges exercising judicial power

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<sup>4</sup> *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

<sup>5</sup> The requirement in libel law that liability can only be based on a defendant's knowledge or recklessness stems from the Supreme Court's landmark decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that the media could not be held liable for defaming a public official unless it acted with "actual malice" meaning knowledge of falsity or reckless disregard for the truth).

<sup>6</sup> Geyh, *supra* note 1, at 928-32.

<sup>7</sup> *Cf. Herbert v. Lando*, 441 U.S. 153, 160 (1979) (allowing a defamation plaintiff to inquire into the subjective mental state of a news editor).

<sup>8</sup> Ronald A. Cass, *Principle and Interest in Libel Law after New York Times*, in *THE COST OF LIBEL* 69, 85 (Everett E. Dennis & Eli M. Noam eds., 1989).

<sup>9</sup> *See generally* LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 490-94 (2002) (discussing the rise of legal realism in American legal thought).

rather than as an application of an objective, transcendent set of principles?<sup>10</sup> This essay will focus on these issues.

### I. WHAT IS AN INTENTIONAL VIOLATION OF THE LAW?

What does it mean for a judge to intentionally violate the law? It could mean, as Geyh suggests, that the judge has reached a decision because of a desire for financial gain, personal favoritism, or because of political, religious, racial, gender, or cultural bias.<sup>11</sup> But holding judges responsible for deciding cases on those grounds is not controversial and is little more than a variant of behavioral misfeasance of the type Geyh discusses in his account of behavioral accountability.<sup>12</sup> There is then no need to sanction judges under a separate category of decisional accountability in these circumstances.

The more difficult question concerns whether a judge should be held accountable when she willfully decides a case “wrongly” because of disagreement with the governing law or with the result that the application of the law would have in the case before her. Geyh, apparently, would hold the judge accountable in these circumstances. As he states,

devotees of civil disobedience the world over understand that when they intentionally violate a law—even when their motives are pure and the law is unjust—they are subject to sanctions. That should be especially true of judges who, by virtue of taking an oath to uphold the law, have foresworn law reform by unlawful means.<sup>13</sup>

And there may be some easy cases. An anti-death penalty judge who continually refuses to uphold capital punishment sentences, even when they are clearly in the bounds of the relevant statutes and the Constitution, may be appropriately sanctioned for ignoring her legal duties. Similarly, a pro-life judge who categorically refuses to grant judicial bypass to minors from parental notification requirements, even when the circumstances clearly call for such action, should also be penalized for ignoring his legal obligations.

But whether a judge should be disciplined for willfully violating the law may not always be so clear. Professor Geyh himself recog-

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<sup>10</sup> See *Erie v. Tompkins*, 304 U.S. 64, 79 (1938) (stating that there is no transcendental body of federal common law).

<sup>11</sup> Geyh, *supra* note 1, at 922.

<sup>12</sup> *Id.* at 919-22.

<sup>13</sup> *Id.* at 923.

nizes this point when he cites the example of Judge Anthony Kline's use of a dissent against controlling precedent as a vehicle to trigger reconsideration of a decision that he believed in error.<sup>14</sup> Kline may have intentionally reached an erroneous result, but his purpose in doing so was not to usurp the rule of law, but rather to take the steps necessary to allow the judicial processes to reconsider what he believed was an erroneous decision.<sup>15</sup> Nevertheless, Geyh suggests that Kline's actions could rightfully be considered inappropriate.

I am not so sure. Perhaps if the legal rule that Kline wanted reviewed was unassailable, he might be reasonably considered to have flouted the rule of law. But if the legal rule in question merited reconsideration, Kline's action could equally be seen as facilitating the rule of law's application.<sup>16</sup>

Let me offer some other examples. Assume that a judge believes that ruling in a particular way, although correct on the law, might undermine the ability of the judicial system to effectively function as an institution. The federal judiciary, like other branches of government, possesses a limited repository of political capital from which its legitimacy is derived. Accordingly, a judge might be concerned, as Alexander Bickel warned, that judicial authority could be undermined if the courts too easily spend that capital by issuing opinions that are perceived (even if erroneously) as being illegitimate or if they reach decisions that are unlikely to be enforced by the other branches.<sup>17</sup> Imagine, then, a judge who is sensitive to this concern and who, on this basis, decides to ignore the governing rule of law and decide a case "incorrectly." Should she be held accountable for her actions? I have often thought (without proof), for example, that the Court's decision in *Marsh v. Chambers*,<sup>18</sup> upholding legislative prayer, was an instance in which the Court ruled the way it did even though it did not seriously believe it was following the correct rule of law.<sup>19</sup> Rather, it

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<sup>14</sup> *Id.*

<sup>15</sup> For a fuller discussion of the controversy surrounding Judge Kline, see Sambhav N. Sankar, Comment, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233, 1233-37 (2000), cited in Geyh, *supra* note 1, at 922 n.34.

<sup>16</sup> The target of Judge Kline's dissent was the California Supreme Court's endorsement of the practice of stipulated reversal, in *Neary v. Regents of the University of California*, 834 P.2d 119 (Cal. 1992), in which the prevailing litigant agrees to have an adverse ruling reversed by an appellate court in return for a payment from the losing side. *Neary* itself has received substantial criticism, in large part as a result of the fact that allowing losing parties to buy their way out of unfavorable judgments may be considered an undermining of the rule of law. See Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1078 (1993) (criticizing the practice of stipulated reversal).

<sup>17</sup> See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

<sup>18</sup> 463 U.S. 783 (1983).

<sup>19</sup> That *Chambers* was "wrong" under existing Court precedent was not seriously debated.

upheld the practice because it feared that Congress would ignore its decision (and continue to open its sessions with legislative prayer) and thus expose the federal judiciary's vulnerability to disobedience by the other branches. But if I am correct in my assessment of the case and the Court majority willfully violated the law, should the majority Justices be sanctioned or should the preservation of the courts' legitimacy itself be considered a legitimate judicial function?

Or consider a case in which a judge knowingly reaches an "erroneous" decision because she believes her action is necessary to establish a greater judicial principle. *Marbury v. Madison*<sup>20</sup> may have been such a case. As every student of constitutional law knows, *Marbury* served as a brilliant political maneuver, because Chief Justice John Marshall was able to establish the power of federal judicial review by issuing a decision that did not expose the judiciary to the then very real risk that its decisions would not be enforced.<sup>21</sup> But in order to place the case in this posture, Marshall had to make the very tenuous claim that the First Congress had acted unconstitutionally in allowing mandamus actions to be brought originally in the Supreme Court.<sup>22</sup> Perhaps Justice Marshall thought his constitutional conclusion regarding mandamus and original jurisdiction was correct (although his refusal to defer to the judgment of the First Congress on this issue seems to place his *Marbury* decision at odds with the deference he later applied to their actions in *McCulloch v. Maryland*<sup>23</sup>). But assume, for the moment, that Marshall did not believe that the Judiciary Act of 1789 was unconstitutional in its grant of original jurisdiction for mandamus actions and his holding in *Marbury* was merely a vehicle to establish judicial review. Should Marshall be subject to sanction for such a gambit on grounds that his decision constituted an intentional violation of the law? As with *Marsh v. Chambers*, the conclusion that a deliberate rejection of governing legal principles invariably constitutes a willful violation of law may not always be clear.

Indeed, the Court had no answer to the dissent's claim that even a first-year law student would easily find that the practice violated the Court's own Establishment Clause test. *Id.* at 800-01 (Brennan, J., dissenting).

<sup>20</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>21</sup> The decision dismissing the case on jurisdictional grounds meant that there was no ruling for the Executive branch to enforce.

<sup>22</sup> *Marbury*, 5 U.S. at 175.

<sup>23</sup> 17 U.S. 316, 401-02 (1819) (suggesting the Court should defer to the decision of the First Congress with respect to whether Congress has the power, under the Commerce Clause, to incorporate a national bank).

Finally, what about cases like *Bush v. Gore*?<sup>24</sup> Judge Posner, for example, explains the case as one involving “rough justice,” meaning that the Court decided the case with little or no reference to established legal principle in order to achieve a result that it believed best served the overall interests of justice and national stability.<sup>25</sup> As I have written elsewhere,<sup>26</sup> *Bush v. Gore* may not be the only example of courts acting in this fashion, and ironically, *New York Times v. Sullivan*,<sup>27</sup> the case that provides the knowing and reckless disregard standard that Geyh adopts, may also be an instance of this type of case. But assuming that the Justices in *Bush v. Gore* and/or *Sullivan* acted in good faith, should they be subject to sanction for willfully violating the law if their purpose truly was to achieve rough justice?

To be sure, the examples of Judge Kline, *Chambers*, *Marbury*, and *Bush* might be considered the exceptions that prove Professor Geyh’s rule. Each example, after all, involves highly unusual circumstances. (Actually, I suspect that many participants in this Symposium might suggest that at least some of the examples are not exceptions at all and the judges in those particular cases should have been sanctioned.) But whether one agrees with all of these examples or not, they do illustrate a point. Not all intentional violations of the law are the same. Indeed, not even all “good faith” violations, to use Professor Geyh’s terminology, are similar. Some may be based on civil disobedience, as Geyh suggests, but others may be based on broader institutional concerns. A rule that asks only whether a decisional error was willful may miss this larger context.

## II. WHAT IS AN ERRONEOUS DECISION?

Professor Geyh asserts that “the difficulty of proving judicial error pales in comparison to the difficulty of proving that the error was intentional.”<sup>28</sup> I agree that proving intent will be extraordinarily difficult. The problem is that, in our current intellectual climate, proof of error may not be any less. In fact, the proofs of intent and error may be inextricably linked—at least in the highly visible constitutional law

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<sup>24</sup> 531 U.S. 98 (2000).

<sup>25</sup> Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 60. Posner’s central contention in this regard is that the decision saved the country from the months of debilitating wrangling that would have occurred had the election been sent to the Congress for resolution. For a critique of this rationale see Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001).

<sup>26</sup> William P. Marshall, *The Supreme Court, Bush v. Gore, and Rough Justice*, 29 FLA. ST. U. L. REV. 787 (2001).

<sup>27</sup> 376 U.S. 254 (1964).

<sup>28</sup> Geyh, *supra* note 1, at 928.

cases that have triggered the concern about judicial independence in the first place.

Let me explain. In citing Professor Tribe's letter, Professor Geyh has it exactly right.<sup>29</sup> We live in a time of great constitutional flux. Part of the reason for this, of course, is that a new generation of conservative thinkers have taken their seats on the bench and have begun rethinking and recrafting constitutional jurisprudence in accord with their judicial philosophy.<sup>30</sup> This alone is neither new nor startling. Constitutional law has undergone other revolutions in previous eras.<sup>31</sup>

What may be different about this era, however, is that the change in constitutional law comes hand-in-hand with an increasing dominance of the legal realist view that the meaning of constitutional law depends on the identity of the judges deciding the case. This is not to say that legal realism itself is new. To the contrary, legal realism has been a part of American jurisprudence since at least the beginning of the twentieth century.<sup>32</sup> But the notion that law reflects the philosophical views of those empowered to decide cases is no longer a mere abstraction or a matter discussed only in the hallowed halls of academia.<sup>33</sup> It is an ingrained aspect of our political and legal culture. We routinely assume, as a culture, that the personal judicial philosophies of the judges decide cases.<sup>34</sup>

Indeed, the prevalence of legal realism is so extensive that it provided the rationale for a Court majority in *Republican Party of Minnesota v. White*.<sup>35</sup> *White* involved a First Amendment challenge to a canon of judicial conduct that prohibited judicial candidates from announcing their views on disputed legal or political issues.<sup>36</sup> The Court, per Justice Scalia, struck down the provision.<sup>37</sup> Notably, in so

<sup>29</sup> *Id.* (citing Lawrence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 294-95 (2005)).

<sup>30</sup> See generally Mark Tushnet, *The Supreme Court 1998 Term Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999) (discussing the new constitutional regime which superceded that of the New Deal and the Great Society).

<sup>31</sup> See generally BRUCE ACKERMAN, *WE THE PEOPLE, TRANSFORMATIONS* (1998) (discussing revolutionary moments in constitutional law).

<sup>32</sup> FRIEDMAN, *supra* note 9, at 490-94; see also EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY VALUE* 74-94 (1973) (describing the rise of legal realism).

<sup>33</sup> See Carol M. Rose, *Judicial Selection and the Mask of Non-Partisanship*, 84 NW. U. L. REV. 929 (1990) (contending that the dominance of legal realism was exposed during the Bork nomination).

<sup>34</sup> See Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19 (describing the rise of legal realism).

<sup>35</sup> 536 U.S. 765 (2002).

<sup>36</sup> *Id.* at 768.

<sup>37</sup> *Id.* at 788.

doing, the Court rejected the claim that such a provision was necessary to promote judicial impartiality. As Scalia explained:

when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.<sup>38</sup>

Justice Scalia's conclusion could not be clearer. Case results depend upon who is deciding the matter.

What then does all this have to do with erroneous decisions? The answer is everything. If the law is the product of the judges empowered to decide cases, then the concept of "erroneous" results takes on a new meaning. Rather than decisions being right or wrong, they are merely reflective of the current constitution (pun intended) of the Court. In such circumstances, the only willful judicial "error" is that a judge's beliefs as to a particular constitutional issue may be out of sync with that of a majority of the Supreme Court. But is that truly error or is it mere disagreement? Consider, for example, the relentless efforts of some justices to change the law and how those efforts should be characterized. Did Justice Brennan willfully err when he continually dissented in a series of cases holding that the Eleventh Amendment barred federal question suits against the states?<sup>39</sup> Or, in seeking to overturn century old precedent,<sup>40</sup> was he just out of step with a majority of his colleagues? Is Justice Thomas intentionally wrong when he insists, despite seventy years of precedent,<sup>41</sup> that the Commerce Clause does not allow Congress to regulate manufacturing or agriculture?<sup>42</sup> Or is he just awaiting the appointment of like-minded jurists?<sup>43</sup> And in any case, should Justice Brennan or Justice Thomas be sanctioned for their actions?<sup>44</sup>

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<sup>38</sup> *Id.* at 776-77 (italics omitted).

<sup>39</sup> *E.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 259-60 (1985) (Brennan, J., dissenting); *Edelman v. Jordan*, 415 U.S. 651, 688 (1974) (Brennan, J., dissenting).

<sup>40</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>41</sup> *E.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>42</sup> *E.g.*, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (Thomas, J., dissenting).

<sup>43</sup> In this respect, Justice Rehnquist had it right in his dissent in *Garcia* from the decision holding that the states could be subject to the Fair Labor Standards Act. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Rehnquist, J., dissenting). If you do not like the law as it stands, simply dissent and wait for it to change. Indeed, in *Garcia* Rehnquist explicitly stated that he was confident the law would change to support his position. *Id.* at 580.

<sup>44</sup> Indeed, under this understanding of the meaning of law, even the so-called easy cases

To be sure, different considerations apply to lower court judges than to Supreme Court Justices with respect to the obligation to follow the law. The lower courts are bound by precedent in a way that the Supreme Court is not. But unless a lower court judge were to explicitly announce that she reached a particular result because she is under no obligation to follow Supreme Court precedent,<sup>45</sup> the essential point will remain the same. When the fabric of constitutional law itself is up for grabs, how can a judge's constitutional ruling be willfully erroneous?<sup>46</sup>

### CONCLUSION

Professor Geyh has undertaken an important effort in an attempt to insulate the judiciary from inappropriate political attack. His attempt, however, rests on two important premises: first, that all intentional violations of the law are problematic; and second, that correct and incorrect decisions can be appropriately distinguished. The first assertion however, ignores that intentional violations of the law may often serve larger values while the second treats the law as a more certain construct than our current intellectual climate allows. To be sure, Professor Geyh is correct in seeing the current political attacks on judges as threatening to judicial independence. But I am afraid that his solution, or perhaps any other, will not make that particular problem go away. When law is conceived as politics, it is not surprising that controversial decisions trigger political reactions.

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that I mentioned at the outset may not be so simple. The capital punishment opponent may merely be anticipating that a new Court will find all capital punishment unconstitutional. The pro-life judge may believe that an appropriately constituted Court will find all abortion to be unconstitutional. If so, can it be said that the judge who refuses to enforce the death penalty or a parental notification bypass has intentionally violated the law?

<sup>45</sup> One such instance of this occurred in *Jaffree v. Board of School Commissioners*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983) where the district court held that it was under no obligation to follow the Supreme Court's Establishment Clause precedents.

<sup>46</sup> Professor Geyh cites Judge Roy Moore's decision to ignore a federal court order demanding that he remove the Ten Commandments from his courtroom as an example of a willful violation of the law. Geyh, *supra* note 1, at 928. Indeed it was. But Moore's action was not in the form of a judicial ruling. Rather it was taken in response to a court order directed against him.

