GIVING NEW MEANING TO "JUSTICE FOR ALL": CRAFTING AN EXCEPTION TO ABSOLUTE JUDICIAL IMMUNITY

Brittney Kern[*]

2014 MICH. ST. L. REV. 149

TABLE OF CONTENTS

---

* J.D. 2014, Michigan State University College of Law; B.A. 2011, The Pennsylvania State University. The Author would like to thank Professor Philip Pucillo for his constant support, constructive criticism, and guidance throughout the drafting of this Comment. The Author also thanks Jacqueline Clarke, David Aschwege, Katherine Wendt, Rachael Roseman, and the entirety of the *Michigan State Law Review* for their editing efforts and valuable feedback. Finally, the Author thanks her family for their unwavering support in her entire educational career.

INTRODUCTION

Hillary Transue was a high school sophomore when she was ordered to appear before Judge Mark Ciavarella regarding a fake Myspace account that she had created to mock the assistant principal of her school.[1] Hillary and her mother had expected that Hillary would be given a "stern lecture" and would perhaps be ordered to complete community service as punishment.[2] However, despite knowing that Hillary was a great student who had no other offenses on her record, Judge Ciavarella sentenced Hillary to three months of detention in a juvenile facility.[3]

Judge Ciavarella had earned a nickname of "Mr. Zero Tolerance" by the time that Hillary stood before him in 2007.[4] Though statistics for juveniles being sent to detention facilities were dropping steadily across the country, the Luzerne County courthouse where Judge Ciavarella practiced saw an increase in children being taken from their families and sent to these facilities.[5] Due to the frequency with which juveniles were sentenced by Judge Ciavarella, it became expected and anticipated that the children appearing before him would be separated from their parents and sent away.[6]

---

1. Joel Rose, *After Scandal, New Rules for Juveniles in Pa. Courts*, NPR (Mar. 3, 2012, 4:25 PM), http://www.npr.org/2012/03/03/147876810/after-scandal-new-rules-for-juveniles-in-pa-courts; Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22. The Myspace page included a clear disclaimer that the site was intended as a joke and was not the actual webpage of the assistant vice principal. John D. "Jay" Elliott, *A Lawyer's Guide to Luzerne County's Kids for Cash Scandal*, MARSH LAW FIRM'S CHILDLAW BLOG (Aug. 5, 2010), http://www.childlaw.us/a_lawyers_guide_to_luzerne_cou/#.UxuA0F7sVxM.

2. Rose, *supra* note 1.

3. *Id.*

4. Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, N.Y. TIMES, Mar. 28, 2009, at A1. In addition to sentencing Hillary to three months, Judge Ciavarella sentenced Kurt Kruger to five months in a juvenile facility in 2004 after Kruger was charged for acting as a lookout while his friend stole DVDs from a Walmart store. *Id.* Additionally, in 2006, DayQuawn Johnson was sentenced to "several days" in a juvenile detention facility for failing to appear as a witness, even though Johnson had never received notice of the hearing. *Id.*

5. Urbina & Hamill, *supra* note 1; Urbina, *supra* note 4. Additionally, children appearing in Judge Ciavarella's courtroom "were 10 times as likely to receive out-of-home placement[s] as kids in other Pennsylvania counties." Rose, *supra* note 1.

6. Urbina, *supra* note 4. Judge Ciavarella also did not recommend that the children who appeared in his courtroom attain attorney representation. *Id.* When asked about this, Judge Ciavarella stated that he was not responsible for "'spoon-

Judge Ciavarella, along with Judge Conahan, another Luzerne County judge, was involved in a multi-million-dollar scheme intended to profit a private detention facility operated by Robert J. Powell, a friend of Judge Conahan.[7] In exchange for $2.6 million, Judge Ciavarella assured Powell that his new private facility would receive "tens of millions of dollars that the county and the state would pay to house the delinquent juveniles."[8] Judge Ciavarella's plan was successful, as Powell's facility saw a large influx of juveniles once it was opened.[9]

After Judge Ciavarella's illegal activities were realized,[10] he and Judge Conahan were charged with racketeering, conspiracy, and other criminal charges, and have been sentenced to twenty-eight years and seventeen-and-a-half years in prison, respectively, for their actions.[11] However, because Judge Ciavarella has absolute judicial immunity from civil recourse, the juveniles who were improperly sentenced by him are barred from bringing a civil suit against him and will fail to recover any monetary damages from him.[12] Hillary

---

feed[ing] people to do things in their life.'" *Id.* Likely because of his stance on this, "[f]rom 1997 to 2003, juveniles appeared before Judge Ciavarella without counsel at more than five times the state average, and from 2003 through 2007, that rate was around 10 times the state average." *Id.*

7. *Id.* Powell had the initial idea to build the private facility, but was concerned that his investment would not be successful. Sarah L. Primrose, *When Canaries Won't Sing: The Failure of the Attorney Self-Reporting System in the "Cash-for-Kids" Scheme*, 36 J. LEGAL PROF. 139, 142 (2011). Therefore, the deal he made with the judges helped ensure that Powell would profit from his facility. *Id.*

8. Urbina, *supra* note 4.

9. Primrose, *supra* note 7, at 142-43. Additionally, the state-run facilities were bankrupted due, at least in part, to the lack of government funding. *Id.* Because the funding was allocated based upon the number of juveniles housed in the facility, the state-run facilities received far less money than anticipated, due primarily to Judge Ciavarella's disproportionate sentencing of juveniles to Powell's private facility. *Id.* at 143.

10. The State Department of Public Welfare auditors noticed that the county was consistently billing the state the same amount of money each month for juvenile detention facilities. *Id.* at 148. In most counties, the amount billed to the state fluctuates each month, depending on the number of juveniles sent to the facilities during that period. *Id.* This realization led to the discovery of Judge Ciavarella's illegal activities. *Id.*

11. Rose, *supra* note 1; Jon Campisi, *Developer in 'Kids for Cash' Judicial Scandal Agrees to Settle Outstanding Civil Cases for $17.75 Million*, PA. REC. (Dec. 20, 2011, 2:11 PM), http://pennrecord.com/news/4296-developer-in-kids-for-cash-judicial-scandal-agrees-to-settle-outstanding-civil-cases-for-17-75-million.

12. Associated Press, *Pennsylvania: Partial Immunity*, N.Y. TIMES (Nov. 21, 2009), http://query.nytimes.com/gst/fullpage.html?res=9904E6D81131F932A15752C1A96F9C8B63.

will forever have to live with the fear and humiliation that she felt in Judge Ciavarella's courtroom, after being handcuffed and taken away from her family, but she will never receive damages from Judge Ciavarella stemming from his violation of her rights.[13]

In 1872, the Supreme Court decided the landmark case of *Bradley v. Fisher*,[14] in which the Court detailed the doctrine of absolute judicial immunity and the requirements necessary for the immunity to apply.[15] Absolute judicial immunity has been further developed since 1872, but many of the same requirements still apply, and, today, judges are still considered absolutely immune from liability under the guidelines set forth in *Bradley*.[16] Under absolute judicial immunity, judges are provided with complete protection for any civil action brought against the judge for any judicial act taken, as long as the judge does not act in a clear absence of all jurisdiction.[17] Absolute judicial immunity, however, provides judges with protection that is far too broad in scope.[18]

Instead of providing a blanket protection for each judge, a limitation should be placed on absolute judicial immunity from civil recourse.[19] This limitation would disqualify a judge from being protected by absolute judicial immunity if the judicial conduct is sanctionable under the state or federal version of the Model Code of Judicial Conduct and if the judge acted with malice.[20] If these elements are met, the judge would be unable to assert absolute judicial immunity as a defense and would be subject to civil suit in order to compensate the individuals victimized by the judge's actions.[21] If, however, the judge does not act in a manner for which he or she could be sanctioned or the judge does not act with malice, then the judge should be able to offer absolute judicial immunity as a bar from civil action.[22]

Part I discusses in further detail the history of absolute judicial immunity, beginning with an examination of the policy

13. Rose, *supra* note 1. Hundreds of the juveniles sentenced by Judge Ciavarella did, however, have their records expunged. Urbina, *supra* note 4.

14. 80 U.S. (13 Wall.) 335, 351 (1872).

15. *Id.* at 351; SHELDON H. NAHMOD, MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL TORTS 416 (3d ed. 2010).

16. 80 U.S. at 351; *see infra* Part I.

17. *See infra* notes 57-61 and accompanying text.

18. *See infra* Section I.B.

19. *See infra* Section III.A.

20. *See infra* Section III.A.

21. *See infra* Section III.A.

22. *See infra* Section III.A.

considerations asserted by advocates of the doctrine and continuing with the earliest British case law. This Part concludes with a discussion of cases from the twenty-first century in which absolute judicial immunity was considered. Part II dissects the Model Code of Judicial Conduct, which serves as a set of guidelines to which judges are supposed to abide and as recommendations to each state as to what judicial activity should be sanctionable. Finally, Part III further develops the proposal of amending absolute judicial immunity to include this limitation, which is determined by whether the judge acts in a way that can be sanctionable and with malice. Part III concludes with a reflection of the policy concerns that have left absolute judicial immunity relatively unscathed throughout the centuries and indicates why this proposal is necessary to ensure that no plaintiff is left without relief when a judge violates his rights.

I. ABSOLUTE JUDICIAL IMMUNITY THROUGH THE YEARS

Absolute judicial immunity is one in a series of immunities provided to four main classes of individuals: judges, legislators, prosecutors, and witnesses.[23] When a member of one of these classes can successfully show that absolute immunity should apply, the individual is protected from civil liability, even if the individual has acted in such a way that he would otherwise be liable for his activities.[24] Additionally, the individual does not need to defend against the civil action, as the immunity can be asserted in the early part of an action and can lead to an immediate dismissal of the civil case.[25]

Advocates for absolute immunity defend the doctrine with three primary policy considerations: deterrence, inhibition, and distraction.[26] First, as applied to the judiciary, absolute immunity prevents deterrence from government service by protecting judges from frivolous lawsuits based on decisions made from the bench.[27] Second, absolute immunity prevents inhibition in the performance of

23. *See generally* Robert F. Brown, *Individual Immunity Defenses Under Section 1983*, *in* SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 445, 445-63 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3d ed. 2006).

24. *See generally id.*

25. *See generally id.*

26. *See id.* at 451.

27. Interview with Philip Pucillo, Lecturer in Law, Mich. State Univ. Coll. of Law, in E. Lansing, Mich. (Nov. 28, 2012). *See generally* Brown, *supra* note 23.

judicial functions by alleviating any concern that a judge may be sued based on her judicial decisions.[28] Third, absolute immunity prevents distractions in the performance of judicial functions by preventing judges from being absent from judicial obligations while defending themselves in civil lawsuits.[29] These three policy concerns have helped propel absolute judicial immunity through the centuries, beginning first in British common law and continuing through the American jurisprudence system.[30]

A. Origins of Absolute Judicial Immunity

Absolute judicial immunity, which stems originally from British common law,[31] has navigated through the American judicial system while remaining relatively unchanged.[32] Over the course of many centuries, the doctrine has been clarified substantially, but it has never been significantly altered.[33]

One of the earliest appearances of absolute judicial immunity occurred in Britain in 1607.[34] In *Floyd & Barker*, Lord Coke discussed the scope of immunity available to judges and the immunity's underlying rationale.[35] Lord Coke stated in his opinion that judges should not be "question[ed] for any supposed corruption . . . except it be before the King himself; for they are only to make an account to God and the King, and not to answer to any suggestion in the Star Chamber; for this would tend to the scandal and subversion of all justice."[36] *Floyd* made clear that a judge had immunity for all acts performed while functioning as a judge because the only person to whom a judge would need to answer was the King.[37] This case

28. Interview with Philip Pucillo, *supra* note 27. *See generally* Brown, *supra* note 23.

29. Interview with Philip Pucillo, *supra* note 27. *See generally* Brown, *supra* note 23.

30. *See infra* Section I.A.

31. *See infra* notes 34-38 and accompanying text.

32. *See infra* notes 34-71 and accompanying text.

33. *See infra* notes 34-71 and accompanying text.

34. Floyd & Barker, (1607) 77 Eng. Rep. 1305 (Star Chamber); 5 Co. Rep. 23.

35. *Id.* at 1305-07. In this case, Lord Coke, acting on behalf of the King's Court, granted a judge immunity from a civil action brought against him. *Id.*; Timothy M. Stengel, Comment, *Absolute Judicial Immunity Makes Absolutely No Sense: An Argument for an Exception to Judicial Immunity*, 84 TEMP. L. REV. 1071, 1076 n.45 (2012).

36. *Floyd*, 77 Eng. Rep. at 1307.

37. *Id.*; Stengel, *supra* note 35, at 1076 n.45.

became notable in the United States years later, as it is most often cited when examining the roots of absolute judicial immunity.[38]

The first case in which the United States Supreme Court discussed absolute judicial immunity and its scope was *Randall v. Brigham* in 1868.[39] In this case, the plaintiff, Randall, was brought before the defendant, Judge Brigham, after one of Randall's clients brought a suit against him.[40] Though Randall settled the discrepancy with his client outside of court, Judge Brigham determined Randall's actions were "unconscionable" and ordered that Randall no longer be permitted to practice law in the state of Massachusetts.[41] Randall then sued Judge Brigham for unlawful removal and sought monetary relief.[42]

The Court, in its opinion, discussed the importance of absolute judicial immunity in the American judicial system.[43] The Court clearly articulated that judges require the ability to make decisions freely—without needing to consider the personal effects of those decisions—in order for the judicial process to work properly.[44] The Court also determined that judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly."[45] This proved to be an important distinction, as the *Randall* Court did not resolve whether a judge, who acts maliciously or corruptly, while also acting in excess of his or her jurisdiction, may be disqualified from claiming absolute judicial immunity.[46] The Court accentuated the point that judges can be sanctioned or even impeached when their actions are "faithless," "corrupt," "dishonest," or "partial."[47] However, judges would not be responsible "to private parties in civil actions for their judicial acts,

38. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 533, 536 (1869); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347-48 (1872).

39. 74 U.S. 523.

40. *Id.* at 525-26.

41. *Id.*

42. *Id.* at 526.

43. *Id.* at 536.

44. *Id.* The Court elaborated on this point by stating that judges would be influenced by personal considerations "if, whenever they err in judgment as to their jurisdiction, . . . they may be subjected to prosecution at the instance of every party imagining himself aggrieved, and be called upon in a civil action in another tribunal . . . to vindicate their acts." *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 537.

however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly."[48]

Three years later, the Supreme Court again addressed the application of absolute judicial immunity.[49] In *Bradley v. Fisher*, the plaintiff, Bradley, tried a case before the defendant, Judge Fisher.[50] Bradley and Judge Fisher exchanged a number of insults during the course of the trial.[51] After the trial concluded, Judge Fisher executed an order disbarring Bradley from practicing before the Supreme Court of the District of Columbia.[52] Bradley sued Judge Fisher and sought monetary relief stemming from Judge Fisher's actions.[53]

The Court once again expressed adamant support for absolute judicial immunity and detailed exactly why, and in what situations, the immunity should apply.[54] In addition to restating the importance of judicial freedom in the decision-making process,[55] *Bradley* clarified the doctrine of absolute judicial immunity in two primary ways.[56] First, the opinion articulated the distinction between a judicial act completed in excess of jurisdiction and a judicial act

48. *Id.*
49. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).
50. *Id.* at 344.
51. *Id.*
52. *Id.*
53. *Id.* at 345.
54. *Id.* at 347-54. Primarily because of this detail, *Bradley* is still used as the determinative case for issues concerning absolute judicial immunity. NAHMOD, WELLS & EATON, *supra* note 15, at 416.
55. The Court used much of the same reasoning in *Bradley* that had already been presented in *Randall*. *See Bradley*, 80 U.S. at 347; Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1869). For instance, and perhaps one of the most important consistencies from these cases, the Court once again drew out the importance of judicial freedom from inhibition. *Bradley*, 80 U.S. at 347; *Randall*, 74 U.S. at 536. In *Bradley*, the Court stated that

> it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.

80 U.S. at 347. Similarly, in *Randall*, the Court stated that judges must be free from influence of the public and free from fear of reprisal from distressed parties. 74 U.S. at 536.
56. 80 U.S. at 351-52.

completed with a clear absence of jurisdiction.[57] After providing a definition and an example for each term,[58] the Court explained that judges are immune from all civil liability unless they have acted in "the clear absence of all jurisdiction."[59] Though the distinction between these two terms is difficult to ascertain,[60] this assertion has proven crucial in contemporary cases asserting the applicability of absolute judicial immunity.[61]

Second, the Court explained that motive could never be considered in absolute judicial immunity scenarios, and thus the immunity would apply even if the judge acted maliciously or corruptly.[62] This determination significantly narrowed the Court's decision in *Randall*, as the Court had previously left open that perhaps judges could lose their protection if they acted in a clear absence of jurisdiction and acted maliciously or corruptly.[63] However, the Court in *Bradley* determined that malice was not sufficient for judges to lose the protection of absolute judicial

---

57. *Id.*

58. Presumably understanding that the distinction between the terms "excess of jurisdiction" and "clear absence of all jurisdiction" was unclear, the Court provided an example to illustrate each situation. *Id.* For a judge to act in excess of jurisdiction, the Court explained that a judge in a criminal court with general jurisdiction over all criminal cases brought before him would still reap the benefits of absolute judicial immunity if the judge proclaims the disputed act to be a "public offence," after which the judge proceeded with the arrest and trial of the accused party, but later it is discovered that the act was in fact a criminal act by law. *Id.* at 352. Because the judge had general jurisdiction over all criminal activity presented within his courtroom, this would merely be an instance of excess of jurisdiction, and the judge would be provided with absolute judicial immunity. *Id.* Conversely, a judicial act is completed in the clear absence of all jurisdiction if the judge of a probate court, with authority to preside over wills and estates, were "to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge." *Id.* The judge would not receive the protection provided through the doctrine of absolute judicial immunity for this clear indiscretion. *Id.* However, these examples prove to be less helpful in more modern cases when the questionable judicial acts occur in chambers or in more administrative decision-making scenarios. *See infra* notes 73-81 and accompanying text.

59. *Bradley*, 80 U.S. at 351.

60. *See supra* note 58 and accompanying text.

61. *See generally* Stump v. Sparkman, 435 U.S. 349 (1978); Mireles v. Waco, 502 U.S. 9 (1991) (per curiam); Dennis v. Sparks, 449 U.S. 24 (1980). Notably, the distinction made in *Bradley*, though later clarified, has never been significantly amended. *See generally* NAHMOD, WELLS & EATON, *supra* note 15, at 416.

62. *Bradley*, 80 U.S. at 354.

63. *See supra* notes 45-48 and accompanying text.

immunity.[64] Specifically, the Court focused on the likely consequences of an exception that was determinative of the aggrieved party proving malice or corruption.[65] In the opinion, the Court expressed that

> [i]f civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. 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.[66]

In sum, the Court determined that malice or corruption could nearly always be alleged in cases in which absolute judicial immunity was a factor.[67] Judges might, therefore, make decisions only after pondering how the decisions may be construed to be malicious or corrupt.[68] Additionally, the Court emphasized that judges who could not be held civilly liable in light of absolute judicial immunity could still face sanctions or impeachment.[69]

B. Modern Case Law Featuring Absolute Judicial Immunity

Though the Court decided the *Floyd*, *Randall*, and *Bradley* cases more than a century ago, these cases are still vital to the consideration of contemporary cases involving the application of absolute judicial immunity.[70] Very few changes have been made to absolute judicial immunity since *Bradley*, but some cases have been sufficiently important and unique to have the doctrine reconsidered by the Supreme Court.[71] Since 1967, the Supreme Court has considered a number of notable cases that discuss the extent of the

---

64. 80 U.S. at 354.

65. *Id.*

66. *Id.* at 348.

67. *Id.* at 354. The Court drew extensively from *Floyd* in making this determination. *See supra* notes 34-37 and accompanying text. Specifically, the Court asserted that "[t]he purity of their motives cannot . . . be the subject of judicial inquiry. This was adjudged in the case of *Floyd* . . . where it was laid down that the judges . . . could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself." *Bradley*, 80 U.S. at 347-48.

68. *Bradley*, 80 U.S. at 354.

69. *Id.*

70. *See generally* Stump v. Sparkman, 435 U.S. 349 (1978); Forrester v. White, 484 U.S. 219 (1988); Mireles v. Waco, 502 U.S. 9 (1991) (per curiam).

71. 80 U.S. 335.

immunity,[72] three of which are especially relevant to the proposed limitation.

1. Stump v. Sparkman

The Supreme Court considered the applicability of absolute judicial immunity in 1978 in *Stump v. Sparkman*.[73] Ora McFarlin, mother of fifteen-year-old Linda Sparkman, brought a petition to Judge Stump seeking his approval to have Sparkman undergo a tubal ligation, which would permanently sterilize her.[74] McFarlin stated in the petition that Sparkman was "'somewhat retarded'"[75] and had been spending the night out with men.[76] Citing concern for her daughter's well-being, McFarlin requested that Judge Stump sign a petition that would permit the procedure.[77] Without requesting further proof of McFarlin's allegations, Judge Stump agreed to the petition, which not only authorized the surgery, but also indemnified the surgeon and the hospital where the procedure was to be performed.[78] A few weeks later, Sparkman was taken to the hospital under the pretense of having her appendix removed, and the tubal ligation was performed.[79] Only years later when Sparkman was married and trying to conceive did she finally learn that she had been sterilized.[80] Following this realization, Sparkman and her husband entered suit against Judge Stump.[81]

The Supreme Court found that Judge Stump's action was a judicial act under the definition provided in *Bradley* and that Judge

---

72. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967); Butz v. Economou, 438 U.S. 478 (1978); *Stump*, 435 U.S. 349; Dennis v. Sparks, 449 U.S. 24 (1980); Cleavinger v. Saxner, 474 U.S. 193 (1985); *Forrester*, 484 U.S. 219; *Mireles*, 502 U.S. 9.

73. 435 U.S. 349.

74. *Id.* at 351.

75. *Id.* Despite this assertion, Sparkman progressed with her class in school. *Id.*

76. *Id.* Other than the declaration of these statements in the petition, McFarlin offered no further proof that these statements were in fact accurate. *Id.* & n.1.

77. *Id.* For a description of this procedure, see *Sterilization for Women (Tubal Sterilization)*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/health-topics/birth-control/sterilization-women-4248.htm (last visited Mar. 13, 2014).

78. *Stump*, 435 U.S. at 352-53.

79. *Id.* at 353.

80. *Id.*

81. *Id.*

Stump had jurisdiction to consider McFarlin's petition.[82] In making this decision, the Court drew heavily from *Bradley* in discussing the importance of absolute judicial immunity.[83] Specifically, the Court insisted that

> the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."[84]

The Court determined that, because there was no express provision of Indiana law prohibiting Judge Stump from considering a parental sterilization petition, Judge Stump had jurisdiction to consider the petition.[85] The Court then explained that Judge Stump's action constituted a judicial act because it met two separate, but related, factors.[86] First, a judicial act must be a "function normally performed by a judge."[87] Second, a judicial act is one in which the parties "dealt with the judge in his judicial capacity."[88] The Court insisted that, because McFarlin approached Judge Stump for his affirmation of the petition due to the fact that he was a judge, his action must be considered a judicial act.[89] The Court concluded the opinion by explaining that, though parties are sometimes injured by

---

82. *Id.* at 357-58.

83. *Id.* at 355-56 (noting that the Court's opinion in *Bradley* extensively discussed the importance of judicial freedom in the decision-making process, free from any thought of possible personal consequences).

84. *Id.* at 356-57 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)).

85. *Id.* at 357-58. The Court specifically considered the Indiana statute that provided jurisdiction to Judge Stump, which granted him "jurisdiction over the settlement of estates and over guardianships, appellate jurisdiction as conferred by law, and jurisdiction over 'all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.'" *Id.* at 357 (quoting IND. CODE § 33-4-4-3 (1975)). Additionally, the Supreme Court considered the Indiana statute that granted permission for the sterilization of only institutionalized persons, but "otherwise contained no express authority for judicial approval of tubal ligations." *Id.* at 358. However, the Supreme Court ultimately determined that, because there was no express provision prohibiting an Indiana judge from considering a parental petition for the sterilization of a child, Judge Stump had jurisdiction. *Id.* at 357-58.

86. *Id.* at 361-62. However, *Bradley* does not actually provide a definition or a test that should be used to determine whether an act by a judge should be considered a judicial act. *Id.* at 365 (Stewart, J., dissenting).

87. *Id.* at 362 (majority opinion).

88. *Id.*

89. *Id.*

the actions of a judge, absolute judicial immunity does not, and should not, consider fairness and potential harm done.[90] Ultimately, the Supreme Court upheld Judge Stump's absolute immunity.[91]

2. Forrester v. White

The Supreme Court again considered absolute judicial immunity in *Forrester v. White*, which presented the question of whether a judge should receive the protection of the immunity when performing an administrative act.[92] Judge White, a circuit judge in the Illinois, had the authority under Illinois law to hire and fire probation officers,[93] and hired Cynthia Forrester as a probation officer.[94] Forrester was ultimately fired from her position and brought suit against Judge White, claiming that Judge White's actions violated Title VII of the Civil Rights Act of 1964 and Section 1 of the Civil Rights Act of 1871.[95]

In granting certiorari in this case, the Court hoped to further clarify situations in which absolute judicial immunity should apply.[96] As the Court asserted, most of the difficulties associated with absolute judicial immunity are caused by the lack of clarity in "draw[ing] the line" between an act done by a judge and a judicial act, as only judicial actions are protected by absolute judicial immunity.[97] Despite the fact that administrative decisions do play a

---

90. *Id.* at 363. The Court quoted *Bradley* in stating that

> [d]espite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of "the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself."

Id. (second and third alterations in original) (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872)).

91. *Id.* at 364. In light of the Court's finding that Judge Stump was protected by absolute judicial immunity, Sparkman and her husband were unable to collect any damages from Judge Stump. *See supra* note 48 and accompanying text.

92. 484 U.S. 219, 230 (1988).

93. *Id.* at 221. The applicable Illinois law that granted Judge White the ability to hire and fire probation officers at will has been repealed. *Id.* (citing ILL. REV. STAT., ch. 38, ¶ 204-1 (1979)).

94. *Id.*

95. *Id.*

96. *Id.* at 225.

97. *Id.* at 227. Further, "[t]his Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and the

substantial role in the entirety of the judicial process, the Court determined that administrative actions, when completed by judges, do not allow the judge to be protected by immunity.[98]

Given the facts of *Forrester*, the Court determined that Judge White was acting in an administrative capacity when he fired Forrester.[99] Though his act "may have been quite important in providing the necessary conditions of a sound adjudicative system," the Court reasoned that

> a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages.[100]

In rejecting the application of absolute judicial immunity, the Court addressed the two main reasons monetary damages are awarded in civil suits.[101] First, monetary damages compensate the victim for the "wrongful actions" of the defendant.[102] Second, and arguably more importantly, monetary damages discourage illegal behavior from this specific defendant and other individuals who may otherwise act similarly in the future.[103] Though there have been strong arguments made for the protection of hiring and firing of employees by judges,[104] the Court nevertheless determined that this administrative action would not cause extreme inhibition, as would judicial acts

---

administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.*

98. *Id.* at 228.

99. *Id.* at 229.

100. *Id.*

101. *Id.* at 223.

102. *Id.*

103. *Id.*

104. The Court of Appeals for the Seventh Circuit provided a scenario that illustrated this problem. *Id.* at 229 (citing Forrester v. White, 792 F.2d 647, 658 (7th Cir. 1986)). It stated that this could occur when "'[a] judge loses confidence in his probation officer, but hesitates to fire him because of the threat of litigation. He then retains the officer, in which case the parties appearing before the court are the victims, because the quality of the judge's decision-making will decline.'" *Id.* (quoting *Forrester*, 792 F.2d at 658). However, the Supreme Court responded to this hypothetical scenario by reasoning that a judge could reassign the duty of firing the employee if the judge were too burdened by the possibility of personal liability. *Id.* at 229-30.

protected by immunity.[105] This case, therefore, is especially notable as it limits the application of absolute judicial immunity.

3. Mireles v. Waco

Three years after the Court decided *Forrester*, it once again granted certiorari to an absolute judicial immunity case.[106] In this case, Howard Waco, a Los Angeles County public defender, filed suit against Judge Mireles, a judge of the California Superior Court, and two police officers.[107] Judge Mireles had ordered the two officers "'to forcibly and with excessive force seize and bring [Waco] into [Judge Mireles's] courtroom'" after Waco failed to appear in court.[108] According to the petition for certiorari,[109] Judge Mireles "'knowingly and deliberately approved and ratified each of the . . . acts' of the police officers."[110] Waco, in bringing suit against Judge Mireles, sought punitive damages in addition to compensatory damages.[111]

The Court stated, as was well established at this point, that absolute judicial immunity, like other forms of immunity, is intended to protect officials not only from monetary damages, but also from the hassle and embarrassment of suit.[112] This principle, in the Court's opinion, was well worth a restatement, as it immediately dismissed as immaterial Waco's claims that Judge Mireles acted knowingly and maliciously.[113] The Court noted that there are only two incidents where absolute judicial immunity does not apply: (1) where the actions of the judge are not considered to be judicial acts; and (2) where the judge acts in a complete absence of all jurisdiction.[114]

---

105. *Id.* at 230. In making this holding, the Court did not consider what actions should be taken next against Judge White, but rather only remanded the case for further proceedings. *Id.*

106. Mireles v. Waco, 502 U.S. 9 (1991) (per curiam). However, the Court deemed *Mireles* to be sufficiently straightforward to decide the case per curiam. *Id.*

107. *Id.* at 10.

108. *Id.* (quoting Petition for Writ of Certiorari at B-3, *Mireles*, 502 U.S. 9 (No. 91-311)).

109. The allegations presented by Waco in his complaint must be considered true in this case, as the case is an appeal of a motion to dismiss. *Id.* at 11. Therefore, all decisions rendered in this case are based on the assumed accuracy and truthfulness of Waco's complaint, as is standard for an appeal of this nature. *Id.*

110. *Id.* at 10 (quoting Petition for Writ of Certiorari, *supra* note 108, at B-4).

111. *Id.*

112. *Id.* at 11 (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

113. *Id.* (citing Pierson v. Ray, 386 U.S. 547, 554 (1967)).

114. *Id.* at 11-12.

Because ordering police officers to bring an individual to court is a normal judicial function, the Court determined that Judge Mireles's order was a judicial act under the definition recognized by the Court, even though it allegedly involved excessive force.[115] Though the Court seemed to realize that this may be an unpopular decision, it explained that if Judge Mireles's action had not been considered a judicial act, then, by extension, absolute judicial immunity would be inapplicable to any mistake made by a judge.[116] This, if it were to become a reality, would once again breed inhibition in the court system, a clear prospect that the Supreme Court has avoided for over a century.[117] The Court also specified that, even though the act was completed by the police officers, the judge's order was still a judicial act.[118]

The Court discussed, briefly, whether Judge Mireles acted within his jurisdiction, in excess of his jurisdiction, or in complete absence of his jurisdiction.[119] Without providing much in the way of explanatory support, the Court determined that Judge Mireles acted in excess of his jurisdiction, as he had the jurisdiction to order police officers to collect Waco and deliver him to Judge Mireles's courtroom, but he did not have the jurisdiction to order the police officers to use unnecessary force.[120] Unfortunately, the lack of explanation in making this determination may cause confusion in future cases, but the Court seemed satisfied that Judge Mireles's order did not cross into an action done in complete absence of all

115. *Id.* at 12. Specifically, the Court stated that "we look to the particular act's relation to a general function normally performed by a judge, in this case the function of directing police officers to bring counsel in a pending case before the court." *Id.* at 13.

116. *Id.* at 12-13 (citing Stump v. Sparkman, 435 U.S. 349, 356, 362 (1978)).

117. *See generally* Randall v. Brigham, 74 U.S. (7 Wall.) 523, 534-35 (1869); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 356-57 (1872); *Stump*, 435 U.S. at 363-64; Forrester v. White, 484 U.S. 219, 229-30 (1988).

118. *Mireles*, 502 U.S. at 13. The Court took this distinction from *Forrester* and stated that

> [a]s *Forrester* instructs, it is "the nature of the function performed, not the identity of the actor who performed it, that inform[s] our immunity analysis." A judge's direction to an executive officer to bring counsel before the court is no more executive in character than a judge's issuance of a warrant for an executive officer to search a home.

Id. (second alteration in original) (citation omitted) (quoting *Forrester*, 484 U.S. at 229).

119. *Id.*

120. *Id.*

jurisdiction.[121] With this final decision, the Court concluded that Judge Mireles should receive the protection of absolute judicial immunity.[122] Following the limitation imposed by *Forrester* only three years earlier, *Mireles* helped confirm that the doctrine of absolute judicial immunity is still alive and well in the American judicial system.

II. THE DUTY OF JUDGES TO ACT ETHICALLY

In order to fully understand the responsibilities of judges to act ethically and without bias, it is prudent to consider the regulations that govern the judiciary. The American Bar Association (ABA) has historically issued the Model Code of Judicial Conduct (Code), which has been adapted throughout the past century.[123] Though the Code is not enforceable by the ABA, state court judges must adhere to their state's version of the Code, which is imposed by the highest court in the state.[124] Most states have drafted a very similar version of the Code to which their judges must abide.[125] Federal judges must adhere to the Code of Conduct for Federal Judges.[126]

---

121. *Id.*

122. *Id.*

123. *See* Am. Bar Ass'n Ctr. for Prof'l Responsibility, *ABA Model Code of Judicial Conduct (2011 Edition)*, ABA, http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html (last visited Mar. 13, 2014).

124. LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 624 (3d ed. 2012). Each individual state has created judicial disciplinary commissions that review allegedly inappropriate judicial behavior. *Id.* at 625. Further, these commissions also have the ability to sanction the state judges. *Id.*

125. *Id.* at 624.

126. *Id.* (citing 175 F.R.D. 363 (1998)). The Code of Conduct for Federal Judges includes canons similar to those in the ABA's Code. *Compare* 175 F.R.D. 363, *with* MODEL CODE OF JUDICIAL CONDUCT (2011). Federal judges can also face sanctions for violating the Code of Conduct for Federal Judges, but cannot be impeached without a formal congressional impeachment process. LERMAN & SCHRAG, *supra* note 124, at 625. Notably, however, Supreme Court justices are immune from the Code of Conduct for Federal Judges, which leaves the justices free from ethical scrutiny. *Id.* Recently, critics have lobbied for the inclusion of Supreme Court justices to the list of judges bound by the Code of Conduct for Federal Judges. R. Jeffrey Smith, *Professors Ask Congress for an Ethics Code for Supreme Court*, WASH. POST (Feb. 24, 2011), http://www.washingtonpost.com/national/law-group-seeks-ethics-code-for-supreme-court/2011/02/23/AB8rKgI_story.html.

A. Historical Background of the Model Code of Judicial Conduct

Despite the many ethical problems that plagued the judiciary in the early years of this nation,[127] the ABA did not set forth ethical rules for judges until 1924.[128] The first version of the Code was written to clarify behaviors that were deemed inappropriate for all judges.[129] Specifically, to demonstrate this intent, the 1924 Code's Preamble stated that the provisions of the Code were to be construed as "suggest[ions of] a proper guide and reminder for judges, and [indications of] what the people have a right to expect from them."[130] Though the provisions ranged in topics from constitutional obligations[131] and judicial opinions[132] to promptness[133] and court

127. Before the formation of the Code, courts generally used biblical passages of ethics as a bar that judges were expected to meet. *See* Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1920-21 (2010) (discussing the role of Saint Paul's teachings to the Thessalonians stressing the avoidance of evil, including the mere appearance of evil).

128. The ABA determined that ethical rules for judges were necessary after Judge Kenesaw Mountain Landis, who was a federal circuit judge, was also appointed Commissioner of Major League Baseball. *Id.* at 1921-22. Judge Landis held the two positions concurrently and received a sizeable income from each, which was troublesome to many attorneys at the time. *Id.* at 1923. However, there were no known laws or regulations that prohibited Judge Landis from occupying both positions at the same time, and thus he was permitted to serve in both positions simultaneously. DAVID PIETRUSZA, JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS 197 (1998). Specifically, Attorney General Palmer stated that "[t]here seems to be nothing as a matter of general law which would prohibit a district judge from receiving additional compensation for other than strictly judicial service, such as acting as . . . commissioner." *Id.* Distressed with this outcome, the ABA insisted that Judge Landis's dual employment brought an appearance of distrust and misconduct to the judiciary. AM. BAR ASS'N, REPORT OF THE FORTY-FOURTH ANNUAL MEETING 61-67 (1921). This issue of public perception had been recognized by other courts previously. *See In re* George A. Davis, 15 Haw. 377, 390 (1904) (Galbraith, J., dissenting). For instance, the Supreme Court of Hawaii stressed that "[t]he law carefully guards not only against actual abuse, but even against the appearance of evil, from which doubt can justly be cast upon the impartiality of judges, or respect for their decisions may be impaired." *Id.* (citing *In re* Dodge & Stevenson Mfg. Co., 77 N.Y. 101, 110 (1879)).

129. CANONS OF JUDICIAL ETHICS (1924).

130. *Id.* pmbl.

131. *See id.* (expressing in part that "[i]t is the duty of all judges in the United States to support the federal Constitution and that of the state whose laws they administer").

132. *See id.* Canon 19 (suggesting in part that "[i]n disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel").

organization,[134] the overall theme of the 1924 Code seemed to stress the appearance of integrity within the judiciary.[135] Further, the Code emphasized the need for judges to remain unbiased in business relationships and other settings in order to ensure fair and just decisions.[136]

Though the Code remained intact and unchanged for nearly fifty years, it has been amended seven times in the last four decades.[137] Through the adaptations, the Code has remained generally consistent, especially in the focus on the need for positive public perception of the judicial system.[138] The 1972 adaptation of the Code only became necessary after a 1969 indiscretion by Justice

---

133. *See id.* Canon 7 (stating in part that judges "should be prompt in the performance of [their] judicial duties, recognizing that the time of litigants, jurors and attorneys is of value").

134. *See id.* Canon 8 (explaining in part that a judge should "not tolerate abuses and neglect by clerks[] and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him").

135. *See generally* CANONS OF JUDICIAL ETHICS. For instance, the fourth provision, entitled "Avoidance of Impropriety," states "[a] judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach." *Id.* Canon 4.

136. *Id.* Canon 32 (stating that judges "should not accept any presents or favors from litigants, or from lawyers practi[c]ing before [them] or from others whose interests are likely to be submitted to [them] for judgment"); *see also id.* Canon 29 (expressing that judges "should abstain from performing or taking part in any judicial act in which [their] personal interests are involved"); *Id.* Canon 26 ("[Judges] should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after [their] accession to the Bench, [they] should not retain such investments previously made, longer than a period sufficient to enable [them] to dispose of them without serious loss. It is desirable that [judges] should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias [their] judgment, or prevent [their] impartial attitude of mind in the administration of [their] judicial duties.").

137. The Code was amended in 1990, 1997, 1999, 2003, 2007, and, most recently, in 2010. Am. Bar Ass'n Ctr. for Prof'l Responsibility, *supra* note 123. In 1972, the ABA changed the name of the Code from the Canons of Judicial Conduct to the Model Code of Judicial Conduct. MODEL CODE OF JUDICIAL CONDUCT (2011).

138. *Compare* MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990) (stating that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities"), *with* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007) (expressing that "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety").

Fortas, a then-sitting member of the Supreme Court.[139] Even though Justice Fortas had not committed a crime, his actions caused public disdain for the American judiciary system, centered primarily on the Supreme Court.[140] In the scandal's aftermath, the ABA created a committee to review the 1924 Code to ensure that the Code put forth sufficiently stringent regulations to keep the public's perception of the judiciary as favorable as possible.[141] Most notable about the 1972 version of the Code was the ABA's commitment to make the Code more of an enforceable set of canons, rather than "aspirational" suggestions of judicial conduct.[142] For instance, the Code required recusal for judges in four specific circumstances,[143] as opposed to the

---

139. Justice Abe Fortas received a compensation of $20,000 for his help with the Wolfson Family Foundation. Ian Millhiser, *Justices Have Been Forced to Resign for Doing What Clarence Thomas Has Done*, THINKPROGRESS (June 19, 2011, 1:19 PM), http://thinkprogress.org/justice/2011/06/19/248151/clarence-thomas-resign/?mobile=nc. Though Justice Fortas's actions were legal, he brought harm to the reputation of the judiciary and resigned soon after the scandal was made public. *Id.*

140. McKoski, *supra* note 127, at 1927-28.

141. *Id.* at 1926.

142. *Id.* at 1928 n.84 (stating that "'[t]he 1972 Code thus effectively strengthened the commitment to regulating appearances as a means to promote public confidence in the courts by making its rules enforceable'" (quoting Charles Gardner Geyh, *Roscoe Pound and the Future of the Good Government Movement*, 48 S. TEX. L. REV. 871, 879 (2007))).

143. *Id.* at 1929-30 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1972)). The 1972 Code stated:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> . . . .
>
> (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) is a party to the proceeding, or an officer, director, or trustee of a party;

1924 Code, which only required recusal in two situations.[144] In accentuating different circumstances in which a judge should recuse himself, the 1972 Code continued to consider "[a]ppearances [as] the heart of judicial ethics."[145] Since the 1972 revision, the Code has remained largely unchanged, though it has been officially updated six times.[146]

B. The Current State of the Model Code of Judicial Conduct

The ABA most recently amended the Code in August of 2010.[147] The Preamble to this current version emphasizes the importance of "[a]n independent, fair and impartial judiciary" for our country, "based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society."[148] In order for the strength and legitimacy of the judiciary to remain intact, "[j]udges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence."[149] Having set the backdrop for ensuring the importance of judicial

---

(ii) is acting as a lawyer in the proceeding.

MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1972).

144. The 1924 Code stated that a judge could not "act in a controversy where a near relative is a party," nor could a judge "perform[] any judicial act in which his personal interests are involved." CANONS OF JUDICIAL ETHICS Canons 13, 29 (1924).

145. McKoski, *supra* note 127, at 1930.

146. *Compare* MODEL CODE OF JUDICIAL CONDUCT (1972), *with* MODEL CODE OF JUDICIAL CONDUCT (2007). Perhaps the most notable changes were made in the 1990 version of the Code, in which the ABA used gender-neutral language when referring to judges and consistently changed "should" to "shall" throughout the canons, to eliminate any possible confusion concerning the enforceability and applicability of the Code to all judges. *Compare* MODEL CODE OF JUDICIAL CONDUCT (1972), *with* MODEL CODE OF JUDICIAL CONDUCT (1990). Additionally, the 1990 Code provided, in commentary, a test to determine whether there is an appearance of impropriety, which is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." MODEL CODE OF JUDICIAL CONDUCT Canon 2 cmt. (1990).

147. Am. Bar Ass'n Ctr. for Prof'l Responsibility, *supra* note 123.

148. MODEL CODE OF JUDICIAL CONDUCT pmbl. (2011).

149. *Id.*

integrity, the 2010 Code strives to maintain a high level of ethical behavior from each member of the American judiciary system.[150]

1. *General Impropriety*

The 2010 Code is separated into four discrete canons, each with its own distinct topic.[151] The first canon warns of actual impropriety and the appearance of impropriety for the judiciary.[152] Rule 1.2, titled "Promoting Confidence in the Judiciary," describes with slightly more clarity what a judge should do to avoid acting with impropriety.[153] It states that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[154] Though this canon is quite vague in its wording, the ABA has included comments from which judges are to construe what types of behaviors violate this particular rule.[155] For instance, the fifth comment states that

> [a]ctual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.[156]

While this comment still is quite broad, and despite that many hypothetical judicial actions can be imagined that would violate this rule, judges are provided with a better of sense of what behavior will prove to be troublesome and may lead to sanctions.[157] For instance, the text specifically mentions that "violations of law" cause

150. *See generally id.*

151. *See generally id.* The first canon focuses on avoiding judicial impropriety and the appearance of impropriety. *Id.* Canon 1. The second canon discusses the importance of judicial impartiality, competence, and diligence. *Id.* Canon 2. The third canon considers "personal and extrajudicial activities" and the potential conflicts that these activities may cause. *Id.* Canon 3. Finally, the fourth canon promotes regulations for judicial campaigns in order to minimize any adverse effects these campaigns may have on the entirety of the judiciary. *Id.* Canon 4.

152. *Id.* Canon 1. Specifically, this canon states that "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." *Id.* Canon 1, R. 1.2.

153. *Id.* Canon 1, R. 1.2.

154. *Id.*

155. *See generally id.*

156. *Id.* Canon 1, R. 1.2, cmt. 5.

157. *Id.* Canon 1, R. 1.2.

impropriety and an appearance of impropriety for the entire judiciary.[158] As such, "violations of law" can be behaviors for which sanctions are warranted, even if the activity is of seemingly minor consequence.[159] Therefore, Judge Ciavarella, who inappropriately sentenced juveniles in order to receive significant compensation, could receive sanctions for racketeering and conspiracy under the standard set forth in the 2010 Code.[160]

Rule 1.3 expands on the previous rule by insisting that "[a] judge shall not abuse the prestige of [the] judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."[161] Though the comments for this rule focus primarily on barring the use of judicial letterhead to help advance the career of another[162] and not using one's position as a judge to avoid driving violations,[163] the language of this rule is sufficiently vague so that other abuses of power would still likely violate this part of the Code.[164] For instance, Judge Mireles's action—ordering police officers to forcibly bring Waco into Judge Mireles's courtroom—would likely be in violation of Rule 1.3 of the 2010 Code.[165]

2. *Judicial Bias*

The second canon of the 2010 Code promotes the importance of impartiality, competence, and diligence within the judicial office.[166] This single canon includes a total of sixteen rules, which range in titles and topics from "Impartiality and Fairness"[167] and "Ensuring the Right to Be Heard"[168] to "Decorum, Demeanor, and

158. *Id.* Canon 1, R. 1.2, cmt. 5.
159. *Id.*
160. *See supra* notes 7-11 and accompanying text.
161. MODEL CODE OF JUDICIAL CONDUCT Canon 1, R. 1.3.
162. *See id.* Canon 1, R. 1.3 & cmt. 2.
163. *See id.* Canon 1, R. 1.3 & cmt. 1.
164. *Id.* Canon 1, R. 1.3.
165. *See supra* notes 108-10 and accompanying text. It is also quite likely that Judge Mireles acted in violation of Rule 1.2 of the 2010 Code as well, if his actions were severe enough to be considered an assault. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1, R. 1.2.
166. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 2.
167. *See id.* Canon 2, R. 2.2 (expressing that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially").
168. *See id.* Canon 2, R. 2.6 (stating in part that "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law").

Communication with Jurors"[169] and "Disability and Impairment."[170] Rules 2.2 and 2.3, however, deal with judicial bias and the negative aspects that bias can have on the judiciary.[171]

Rule 2.3, "Bias, Prejudice, and Harassment," explores the responsibilities of judges to act without bias in all judicial affairs.[172] This rule, in part, states "[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment . . . and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so."[173] The comment section for this rule further develops what type of behavior Rule 2.3 is intended to prohibit[174] and describes the repercussions of judicial bias, prejudice, and harassment.[175] Given the definitions of these disparaging acts provided in the comments, it is likely that Judge Stump's stereotyping of Sparkman, which resulted in Judge Stump's authorization to have Sparkman sterilized based upon her alleged "retardation," would be in violation of Rule 2.3 of the 2010 Code.[176] Further, Judge Fisher, who exchanged insults with Bradley during a trial, would likely also be found to be in violation of this rule.[177] Though Judge Stump's and Judge Fisher's actions were entirely dissimilar, the wording of Rule 2.3 of the 2010

169. *See id.* Canon 2, R. 2.8 (exploring the significance of a judge being "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity").

170. *See id.* Canon 2, R. 2.14 (instituting the requirement that, "[a] judge[,] having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action").

171. *See id.* Canon 2, RR. 2.2-.3.

172. *Id.* Canon 2, R. 2.3.

173. *Id.*

174. *Id.* Canon 2, R. 2.3, cmt. 2. This rule provides examples that include "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; . . . irrelevant references to personal characteristics. . . . A judge must avoid conduct that may reasonably be perceived as prejudiced or biased." *Id.*

175. *Id.* Canon 2, R. 2.3, cmt. 1 (stating that "[a] judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute").

176. *See supra* notes 74-78 and accompanying text. Because Judge Stump simply took McFarlin's declaration of Sparkman's mental capacity as true, without meeting with Sparkman or investigating the matter any further, Judge Stump's actions could be considered stereotypical and prejudicial against someone with alleged mental inhibitions. *See supra* note 75 and accompanying text.

177. *See supra* notes 50-53 and accompanying text.

Code is sufficiently broad to include a substantial number of inappropriate judicial activities.[178]

In addition to prohibiting bias, prejudice, and harassment, the second canon also prohibits excessive external influences that impact the conduct of judges.[179] Rule 2.4, "External Influences on Judicial Conduct," states in part that "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."[180] Further, once again stressing the importance of public appearances,[181] Rule 2.4 insists that "[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."[182] Unfortunately, however, this language does not appear to be strong enough because judges still violate Rule 2.4.[183] An obvious example of this is Judge Ciavarella.[184] Despite Rule 2.4's strict stance on the avoidance of external influence, Judge Ciavarella was sufficiently influenced by Powell to send thousands of juveniles to detention facilities in order to make a personal profit.[185]

3. *Extrajudicial Financial Compensation*

The third canon of the 2010 Code states that "[a] judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."[186] This portion of the Code includes fifteen specific rules, which range in topic and title from "Testifying as a Character Witness"[187] and "Appointments to Governmental Positions"[188] to "Affiliation with

178. *See generally* MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.3.
179. *Id.* Canon 2, R. 2.4.
180. *Id.*
181. *See supra* notes 135-36 and accompanying text.
182. MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.4.
183. *See, e.g.*, *supra* notes 7-11 and accompanying text.
184. *See supra* notes 7-11 and accompanying text.
185. *See supra* notes 7-11 and accompanying text.
186. MODEL CODE OF JUDICIAL CONDUCT Canon 3.
187. *Id.* Canon 3, R. 3.3 (expressing that "[a] judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned").
188. *Id.* Canon 3, R. 3.4 (stating that "[a] judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice").

Discriminatory Organizations"[189] and "Practice of Law."[190] Rules 3.12 and 3.13, though, are focused on financial restrictions for judges.[191]

Rule 3.12, "Compensation for Extrajudicial Activities," limits the ability of judges to be compensated for activities done outside of their judiciary duties.[192] Specifically, this rule states "[a] judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."[193] Though the comments provide limited guidance as to what types of compensation are reasonable,[194] this rule leaves open the opportunity for many types of inappropriate compensation.[195]

Further, Rule 3.13, "Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value," limits the gifts that can be received by judges, particularly from individuals not part of the judge's family.[196] In part, this rule states "[a] judge shall not accept any gifts . . . or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."[197] These gifts have been defined to include a multitude of items—"rewards and prizes";[198] "commercial or financial opportunities and benefits";[199] and "scholarships, fellowships, and similar benefits or

189. *Id.* Canon 3, R. 3.6 (affirming in part that "[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation").

190. *Id.* Canon 3, R. 3.10 ("A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum.").

191. *See generally id.* Canon 3, RR. 3.12-.13.

192. *Id.* Canon 3, R. 3.13.

193. *Id.*

194. The first comment states in part that "[a] judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed." *Id.* Canon 3, R. 3.12, cmt. 1.

195. *See supra* note 139 and accompanying text.

196. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3, R. 3.13.

197. *Id.*

198. *Id.*

199. *Id.*

awards"[200]—if these gifts are unavailable to individuals who are not judges.[201] Further, this rule also prohibits the giving of these same types of gifts to a judge's "spouse, . . . domestic partner, or other family member . . . residing in the judge's household."[202] By providing so many examples of what constitutes inappropriate gifts, the ABA has made this rule somewhat narrower than others.[203] However, this rule still protects against many possible situations of undue influence upon the judiciary.[204]

By stating a vast number of broad rules, the ABA has been able to create a straightforward set of guidelines to hold judges responsible for many irresponsible and inappropriate acts that may bring a negative stigma to the judiciary as a whole.[205] However, by merely creating the list and asking the states to enforce the regulations, the ABA is looking the other way, as judges are still able to harm the general public.[206] In order for judges to adhere to these guidelines, individual states must enforce the guidelines much more stringently, starting perhaps with the removal of protection by absolute judicial immunity if the regulations put forth by the Code are ignored.[207]

III. THE NEED TO RECONSIDER ABSOLUTE JUDICIAL IMMUNITY

Although there are a number of restrictions placed on judges with the hope of enticing them to act ethically,[208] these regulations are simply not severe enough to have any sizeable impact. Judges like Judge Ciavarella, Judge Stump, and Judge Mireles are continuing to act without regard for the general public.[209] Until judges feel more accountable to the public they serve, these trends are likely to continue.[210] Judge Ciavarella's criminal activities in particular, which continued until he was exposed in 2008, indicate

200. *Id.*
201. *See generally id.*
202. *Id.* As stated in the comments, this is to reduce the opportunity for the public to believe the family member is receiving the gift only "to evade Rule 3.13 and influence the judge indirectly." *Id.* Canon 3, R. 3.13, cmt. 4.
203. *Compare id.* Canon 3, R. 3.13, *with id.* Canon 2, R. 2.3.
204. *See id.* Canon 3, R. 3.13.
205. *See generally* MODEL CODE OF JUDICIAL CONDUCT.
206. *See supra* Section I.B.
207. *See infra* Part III.
208. *See supra* Section II.B.
209. *See supra* notes 7-11 and accompanying text; *see supra* Section I.B.
210. *See supra* notes 7-11 and accompanying text; *see supra* Section I.B.

that the propensity of some judges to prioritize their personal desires and benefits above the rights and privileges of the public they serve still continues today.[211] While Judge Ciavarella's actions cannot and should not be considered characteristic of all judges by any means, his ability to act with complete disregard for so many juveniles over the course of so many years should serve as a warning that the standing regulations are simply not working as effectively as necessary.[212]

Rather than a blanket immunity that protects judges from every judicial act taken, judicial immunity should be limited to only protect judges from civil litigation in certain situations.[213] In order to show that absolute judicial immunity should apply, the judge would need to show that he did not act in such a way that he could be sanctioned or that he did not act with malice.[214] If either of these requirements were met, a judge would still be protected by judicial immunity, and the plaintiff would not be able to bring suit against the judge for his alleged action.[215] If, however, the judge is unable to show that he did not act in such a way that he could be sanctioned and cannot show that he did not act with malice, the judge should not be able to assert judicial immunity, and the plaintiff should be able to bring a civil suit against the judge.[216] This restructuring of judicial immunity would help retain protection for judges in most situations, but would provide an opportunity for civil recourse for individuals most seriously harmed by the acts of a judge.[217] Though this solution certainly would not provide every individual injured by a judge's actions with monetary relief, it would present a starting point for holding judges more accountable for their actions, without foregoing all of the policy considerations that have kept absolute judicial immunity in existence for centuries.[218]

A. An Exception to Absolute Judicial Immunity

In order to fairly compensate those individuals who have been victimized by inappropriate and egregious judicial behavior, absolute

211. *See supra* notes 7-11 and accompanying text.
212. *See supra* notes 7-12 and accompanying text.
213. *See infra* Section III.A.
214. *See infra* Subsections III.A.1-2.
215. *See infra* Section III.A.
216. *See infra* Section III.A.
217. *See infra* Section III.A.
218. *See infra* Section III.B.

judicial immunity should be modified to include an exception to provide for situations in which the immunity would not apply.[219] By structuring this exception very narrowly, most judges would still receive full immunity for all judicial activities. However, judges who complete acts that result in, or could result in, sanctions and who have a clearly malicious intent would lose the immunity, leaving these judges liable for civil damages. In order to compensate individuals most grievously harmed by judges, the evaluation to determine whether a judge should lose the ability to assert judicial immunity would center on two mandatory elements. First, the alleged activity must be a sanctionable action under the state or federal version of the Code.[220] Second, the plaintiff would need to show sufficient facts in her complaint that could lead to a finding that the judge acted with malicious intent.[221] If the plaintiff can show preliminary facts that satisfy both of these elements and the judge cannot disprove either element, then the judge responsible for the egregious action would be unable to assert absolute immunity and would instead have to proceed with the civil suit, which could ultimately result in the judge being civilly liable to the plaintiff.[222]

1. *Sanctionable Activity*

The first element would require that the judge's alleged activity be one for which the judge could be sanctioned under the federal or state judicial regulations.[223] Because the ABA has provided a thorough and complete Code that has been adapted and adopted by each state,[224] this element would be quite straightforward. By requiring an element that considers whether sanctions could be asserted, the legitimacy of the claims brought against judges would be ensured.[225] If the alleged activity was not sufficient to warrant

219. *See supra* text accompanying notes 213-18.

220. *See infra* Subsection III.A.1.

221. *See infra* Subsection III.A.2.

222. *See infra* Subsection III.A.3.

223. Of course, federal regulations would apply to federal judges and state regulations would apply to state judges.

224. *See supra* Section II.B. Though state versions of the Code do vary, the general theme of avoiding impropriety and the appearance of impropriety is consistent through each.

225. Though frivolous lawsuits could occur against judges in a small number of situations, the sanctionable conduct requirement would ensure that parties ruled against by the judge do not subsequently bring civil claims against the judge for their loss.

sanctions, then it would also not be sufficient to warrant civil liability.

However, the ABA's Code illustrates many situations where sanctions are warranted, but the judicial actions are likely not sufficiently egregious to warrant civil liability.[226] For instance, Rule 1.3 discusses abuse of judicial power and authority.[227] If a judge were to use his influence to avoid receiving a speeding ticket,[228] this behavior likely should not warrant a civil suit against the judge.[229] For this reason, the second element of this test, proof of malicious intent, becomes necessary. If the judge received sanctions and also acted with malice, then civil liability would much more likely be appropriate.

Additionally, if there was not a clearly identifiable individual victimized by the judge's actions, civil recourse also would be unnecessary. In the driving violation example, an individual could not claim to be victimized simply because a judge did not receive a speeding ticket.[230] In this circumstance, the judge, who could still perhaps be sanctioned under Rule 1.3,[231] would not be liable for civil damages to any individual.

Finally, the sanctions would have to be warranted for a judicial action taken by the judge. Rather than discriminating between an act taken in excess of jurisdiction and an act in clear absence of all jurisdiction, as the American judiciary has traditionally done,[232] any action that warrants sanctions that is taken while the judge is acting in his judicial capacity would be relevant activity for this test. This, therefore, would eliminate the opportunity for civil liability for a judge who uses his position of power to escape a speeding ticket[233] because this action likely would not occur while a judge was acting

226. *See supra* notes 162-63 and accompanying text.

227. MODEL CODE OF JUDICIAL CONDUCT Canon 1, R. 1.3 (2011).

228. *Id.* Canon 1, R. 1.3, cmt. 1.

229. Though judges are not supposed to use their authority to avoid things like speeding tickets and although judges could be sanctioned for this type of action, civil suits in situations such as this hypothetical one would waste court time and resources. This proposal is merely intended for egregious acts by judges, particularly those that actually harm a member of the public or the public as a whole.

230. *See supra* text accompanying note 228. Though an individual may feel the judge is receiving unfair bias due to his or her position in the judiciary, this would not be sufficient to warrant suit. The plaintiff bringing suit against a judge must be injured in such a way that damages are appropriate.

231. *See supra* notes 161-63 and accompanying text.

232. *See supra* notes 57-61 and accompanying text.

233. *See supra* notes 161-63 and accompanying text.

in his judicial capacity. However, Judge Mireles, who used his position of power to order the police officers to forcibly bring Waco to Judge Mireles's courtroom, was acting in his judicial capacity and therefore would be liable for civil recourse to Waco under this proposed test if Waco could show malicious intent.[234]

Therefore, while not all judges who are sanctioned should also be liable for civil damages, having a requirement that the judge's alleged activity warrants sanctions would be overwhelmingly fruitful. Some judges, however, would still be immune under this standard, even though they likely should be held civilly liable as well. For instance, Judge Stump, at the time he approved Sparkman's tubal ligation, did not act in such a way that he could be sanctioned because state law gave him the authority to consider and sign the petition for sterilization.[235] Because of this, he could not be sanctioned for his actions and would not be liable for civil damages under this structure. While this limitation on absolute judicial immunity will not protect every individual who likely should receive damages from judges who act inappropriately, allowing judges to be civilly liable for sanctionable actions taken within their judicial role for which malicious intent can be proved would be a substantial first step in protecting the general public.

2. *Malicious Intent*

The second element of the test to determine whether or not a judge should be protected by absolute judicial immunity for her action focuses on the judge's intent when the act was completed. If the judge acted with a malicious intent, then the judge should not be protected by judicial immunity. This proposition is not novel, as it was considered in the first few cases involving absolute judicial immunity in the United States.[236] In *Randall*, the Court had left open the idea that a judge could perhaps lose her absolute immunity if she acted in complete absence of jurisdiction and acted with malicious

234. *See supra* notes 108-10 and accompanying text.

235. *See supra* note 85 and accompanying text. After Sparkman's case was heard, Indiana created a statute prohibiting instances of parental sterilization, except in extremely specific circumstances. Therefore, if Judge Stump were to act in the same manner today, it is likely that he would be sanctioned for his actions and, if malice could be proven, he could also be liable for civil damages if this suggested model were adopted.

236. *See supra* Section I.A.

intent.[237] However, in *Bradley*, the Supreme Court dismissed this suggestion and determined that intent could never be a factor in determining whether a judge should receive immunity from her actions.[238] The Court in *Bradley* asserted that individuals who were upset by the judge's actions could nearly always allege malice against the judge and that the possibility that maliciousness could be associated with a judge would be unfair and unwarranted.[239]

This fear of inappropriate accusations of malice, while still valid, is not nearly as forceful today as it was in 1872 when *Bradley* was decided.[240] In the 2007 decision of *Bell Atlantic Corp. v. Twombly*[241] and the 2009 decision of *Ashcroft v. Iqbal*,[242] the Supreme Court outlined an updated procedure to ensure that all allegations of malice were verified, at least to some degree, before a case reached trial. In these two cases, the Supreme Court adapted the notice-pleading requirements of the Federal Rules of Civil Procedure to ensure that a party's allegation of malice would be substantiated once discovery had been undertaken.[243] Put another way, a party could not bring a claim for malice without showing a sufficient factual basis in the initial complaint to allow a reasonable conclusion that the claim for evidence would be substantiated after the discovery period had lapsed.[244] If it was determined that the party's claim was unwarranted and that the party did not have enough factual background to make this claim, the judge would have the ability to have the lawsuit dismissed immediately.[245] This new standard would help ensure that parties do not raise superficial claims that the judge acted with malice, thereby protecting the judges who have not acted inappropriately.[246]

3. *Implications of the New Standard of Judicial Immunity*

By considering malice, individuals will be more adequately protected from judges who act with complete disregard for the good of the public. For example, Judge Ciavarella, by accepting money in

237. *See supra* notes 45-48 and accompanying text.
238. *See supra* notes 62-68 and accompanying text.
239. *See supra* notes 62-68 and accompanying text.
240. *See generally* 80 U.S. (13 Wall.) 335 (1872).
241. 550 U.S. 544, 555-56 (2007).
242. 556 U.S. 662, 677-81 (2009).
243. *Twombly*, 550 U.S. at 555-56; *Iqbal*, 556 U.S. at 677-81.
244. *See Twombly*, 550 U.S. at 555-56; *Iqbal*, 556 U.S. at 677-81.
245. *See Twombly*, 550 U.S. at 555-56; *Iqbal*, 556 U.S. at 677-81.
246. Interview with Philip Pucillo, *supra* note 27.

exchange for trafficking children into juvenile facilities, was arguably acting maliciously, as he prioritized his own financial well-being above the welfare of the juveniles entrusted to his care.[247] Therefore, under this proposed test, Judge Ciavarella would likely satisfy both elements, as he participated in an activity within his judicial capacity for which he could be sanctioned, and he acted with malicious intent. If this test were enacted, children like Hillary Transue would be able to bring a civil suit against Judge Ciavarella and could perhaps recover financially from him as well, which would likely provide at least some closure from the horrible situation they were forced to endure.[248]

This standard likely would not have helped Sparkman recover from Judge Stump, as Judge Stump likely did not act with malice.[249] Though Judge Stump did not use his better judgment in permitting Sparkman to undergo the tubal ligation procedure without first consulting with Sparkman herself or another witness who could have corroborated McFarlin's petition, there is no proof that Judge Stump acted maliciously by signing the petition.[250] As such, even though Sparkman was permanently scarred from Judge Stump's actions, Sparkman would not be able to recover civil damages from Judge Stump, even under this suggested model.

It is unclear as to whether Judge Mireles could be held civilly liable to Waco if this test were enacted, as the *Mireles* opinion does not adequately describe Judge Mireles's thoughts when he ordered two police officers to forcibly bring Waco into Judge Mireles's courtroom.[251] It would likely be difficult for Waco to give adequate background facts to show that Judge Mireles acted with malice before the discovery phase of the trial began, which would cause problems for Waco in bringing a civil claim.[252] If Waco could show that Judge Mireles acted with malice, by discriminating against Waco specifically or by ordering an excessive amount of force to be

247. *See supra* notes 7-11 and accompanying text. This disregard was evidenced in a number of ways, including his refusal to recommend that juveniles retain counsel for their hearings. *See supra* note 6 and accompanying text.

248. *See supra* notes 1-3, 12-13 and accompanying text.

249. *See supra* notes 74-78 and accompanying text.

250. *See supra* notes 74-78 and accompanying text.

251. *See supra* notes 108-10 and accompanying text.

252. *See supra* notes 243-44 and accompanying text. Though the higher standard set by the Court in *Twombly* and *Iqbal* would make it difficult for Waco to satisfy the requirements of the initial pleadings, the overall benefit that this higher standard would have on preventing frivolous lawsuits against the judiciary is still beneficial.

used on Waco, then Waco's claim would likely be substantiated, and the case could proceed.

By considering whether a judge has committed actions sufficiently egregious to warrant sanctions while acting in his or her position within the judiciary and by considering whether the judge acted with a malicious intention, more individuals severely harmed by the misdeeds of judges would be able to recover civil damages for their claims. While this solution would not provide civil recourse to every individual victimized by a judge's inappropriate behavior, it would certainly provide a starting point from which judges could be liable for their actions.

B. Policy Considerations

There are three primary policy arguments made in favor of absolute judicial immunity.[253] First, absolute immunity prevents deterrence from government service.[254] The absolute immunity provides a protection to judges from frivolous lawsuits for decisions made behind the bench.[255] If the immunity were discarded altogether, the best judicial candidates could become disinterested in the position for fear of numerous personal lawsuits, excessive personal liability, and possible payment of damages. Second, absolute immunity prevents inhibition in the performance of judicial functions.[256] Because judges are granted immunity for any and all decisions made when acting in a judicial capacity, judges do not need to second guess their decisions or have a fear of reprisal for making a controversial decision.[257] Third, absolute immunity prevents distractions in performance of judicial functions.[258] Judges need not be concerned about missing work or being distracted while presiding over a case by their own personal lawsuits occurring at the same time.[259] Absolute judicial immunity not only provides protection from paying civil damages to individuals victimized by the judge's behavior, but also keeps the entire case from going to trial in the first place.[260] While each of these policy considerations is

253. *See supra* text accompanying notes 26-29.
254. *See supra* notes 26-29 and accompanying text.
255. *See supra* notes 26-29 and accompanying text.
256. *See supra* notes 26-29 and accompanying text.
257. *See supra* notes 26-29 and accompanying text.
258. *See supra* notes 26-29 and accompanying text.
259. *See supra* notes 26-29 and accompanying text.
260. *See supra* text accompanying note 25.

legitimate and important, providing civil recourse to individuals victimized by abhorrent judicial acts should not be prohibited, particularly in situations where a judge can be sanctioned for her judicial misconduct and the plaintiff can show that the judge acted with a malicious intent.[261]

The first policy argument contemplates the importance of not deterring eligible individuals from serving as a judge.[262] As our judiciary relies extensively on the judges themselves, it is of the utmost importance to our society that the best individuals are chosen to become judges and that strong candidates are not deterred from the position due to the ability to be civilly liable for decisions made in a judicial capacity.[263] However, by limiting absolute judicial immunity, by considering whether the alleged actions were sanctionable and were completed with a malicious intent, judicial candidates will not be deterred from service completely. Rather, judicial candidates, and judges themselves, will be deterred from acting with malice while performing judicial duties. This is a significant distinction because the American judicial system will not lose potentially excellent judges. Rather, this adjustment will reinforce the notion that a judge must act fairly and without malice when making his decisions.

The second policy consideration centers on the need to prevent judicial inhibition.[264] In order for judges to make appropriate decisions, it is necessary that the judges feel uninhibited when considering the cases before them, especially when the case is controversial in some way.[265] If judges were to worry extensively about the impact of their decisions on the public and any retribution that the judges may receive for their decisions, judges would likely be tempted to choose a less controversial solution, which would hinder judicial progress.[266] Judicial inhibition would be immensely

261. *See supra* Section III.A.

262. *See supra* text accompanying note 26.

263. *See supra* text accompanying note 26.

264. *See supra* text accompanying note 28.

265. *See supra* text accompanying note 28.

266. For instance, if Justice Blackmun, in writing the Court's opinion for *Roe v. Wade* in 1973, had worried about public outcry concerning the Court's decision, he may have decided on a less controversial outcome. 410 U.S. 113 (1973). If Justice Blackmun had worried that he personally could be named as a party in a civil lawsuit by an individual claiming to be victimized by Justice Blackmun's decision, he may have reconsidered voting with the majority on this case. However, because Justice Blackmun did not have to worry extensively about how the public's view of the decision would impact him personally, Justice

detrimental to the entirety of the judicial process, but the proposed limitation of absolute judicial immunity would only inhibit judges from specifically acting with malice while performing judicial functions.[267] As such, the policy consideration of averting judicial inhibition would be simply tenuous and quite irrelevant if absolute judicial immunity were to include this proposed exception of judicial immunity.

The final policy argument attests that judges should be distracted from their judicial duties as infrequently as possible.[268] While it is certainly true that the American judiciary system functions much more effectively and efficiently when the judges are able to perform their jobs with minimal outside distraction, this benefit should not overpower the right of individuals to recover damages if a judge has victimized them. Lawsuits are an undoubtedly long process, and it is certainly reasonable that a judge who is acting within his judicial role while also preparing for a lawsuit of his own will be distracted and overworked. However, due to the new procedural regulations put in place by *Twombly*[269] and *Iqbal*,[270] if a party's assertion against a judge is not sufficiently substantiated by evidence before the trial is even to begin, the lawsuit will be dismissed immediately.[271] Therefore, the strength of this final policy consideration is substantially outweighed by the need to protect innocent members of the public from abhorrent acts by judges.

CONCLUSION

Absolute judicial immunity should be reconsidered in order to ensure that the purpose and benefit of the immunity is still recognizable in the current state of the judiciary. Absolute judicial

---

Blackmun was able to carefully weigh all of the arguments heard by the Court and write an opinion that, while controversial, expressed the beliefs of the Court.

267. *See supra* note 266 and accompanying text. Because Justice Blackmun was not acting maliciously, had this proposed regulation been in place, he still would not have been inhibited in making his decision in *Roe*. 410 U.S. at 116-17. The proposed regulation would not have affected Justice Blackmun's decision whatsoever, therefore enforcing the idea that judicial inhibition would be of no greater consequence if absolute judicial immunity were restructured to include this proposed limitation.

268. *See supra* text accompanying note 29.

269. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007).

270. Ashcroft v. Iqbal, 556 U.S. 662, 677-81 (2009).

271. *See supra* notes 241-45 and accompanying text.

immunity should be limited so that judges are only civilly liable if their actions are severe enough to warrant sanctions and the victimized party can show malicious intent on the part of the judge. If this standard is met, the plaintiff should be able to bring a civil suit against the offending judge and perhaps receive damages for her ordeal if she were to win the case. This proposed exception to absolute judicial immunity, in this small realm of pertinent situations, would not impede the policy considerations for absolute judicial immunity that have been well established. Rather, the limitation of judicial immunity would ensure that each and every judge lives up to his oath as a public servant. If judges were held more accountable for their actions while serving on the bench, then Hillary Transue, and individuals like her, would likely not have faced the harsh reality of a judge who prioritized his own desires ahead of the rest of the population he took an oath to serve.[272]

272. *See supra* notes 1-13 and accompanying text.