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Mireles v. Waco: The Supreme Court Prescribes the Bitter Pill of Judicial Immunity and Summary Reversal

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CASENOTE

MIRELES v. WACO: THE SUPREME COURT PRESCRIBES THE BITTER PILL OF JUDICIAL IMMUNITY AND SUMMARY REVERSAL

I. INTRODUCTION

> *I do not think that all judges, under all circumstances, no matter how outrageous their conduct are immune from suit. . . . The Court's ruling is not justified by the admitted need for a vigorous and independent judiciary, is not commanded by the common-law doctrine of judicial immunity, and does not follow inexorably from our prior decisions.*
>
> — Justice William O. Douglas[1]

This language opened Justice Douglas' stinging dissent in the 1967 United States Supreme Court decision of *Pierson v. Ray*, holding that section 1983 of the Civil Rights Act did not abolish the common law doctrine of judicial immunity.[2] Eleven years later, the Court expanded and redefined the scope of the doctrine of judicial immunity in *Stump v. Sparkman.*[3] The *Stump* Court attached immunity to actions of a judicial

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1. Pierson v. Ray, 386 U.S. 547, 558-59 (1967) (Douglas, J., dissenting).
2. *Id.* at 554-55. At the time of *Pierson*, § 1983 provided:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured to an action at law, suit in equity, or any other proper proceeding for redress.

42 U.S.C. § 1983 (1967). The *Pierson* decision did not hold that a judge is not a "person" for the purposes of § 1983, nor that judges always are immune from a § 1983 suit. Rather, *Pierson* held that, because Congress did not specifically abolish judicial immunity when it enacted the Civil Rights Act, a judge facing a § 1983 suit could still successfully raise such an immunity. *Pierson*, 386 U.S. at 554-55.

Thus, a judge will not be immune from § 1983 liability if he commits either a non-judicial act or a judicial act in the "clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 356-57 (1978).

3. 435 U.S. 349 (1978); *see* Irene Rosenberg, Stump v. Sparkman: *The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833, 833 (1978) (opining that *Stump* expands the immunity doctrine); Peter H. Schuck, *The Civil Liability of Judges in the United States*, 37 AM. J.

nature taken by a judge in his judicial capacity where such actions were not taken in the clear absence of all jurisdiction. But rather than clarifying the doctrine of judicial immunity, the *Stump* decision generated confusion among courts[4] and commentators[5] alike over what is proper jurisdiction and what is a judicial act under the judicial immunity doctrine.

COMP. L. 655, 664 (1989) (stating that *Stump* provides a broad test for what constitutes a judicial act); Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 S.D. L. REV. 1, 7-8 (1990) (stating that *Stump* delineates the factors relevant to a judicial act); Jeanne F. Pucci, Note, *Immunity Doctrines and Employment Decisions of Judges*, 55 FORDHAM L. REVIEW 621, 622 (1987) (suggesting that *Stump* expands the definition of judicial act beyond its traditional context).

For historical background on the doctrine of judicial immunity, see generally J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879; Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 201 (1980).

4. The confusion in lower courts is amply demonstrated by the experience of the Ninth and Eleventh Circuits. In Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981), the Ninth Circuit held that a judge's "under the table" agreement to rule favorably on a litigant's petition was not a judicial act. *Id.* at 847. The *Rankin* court reasoned that although the litigant dealt with the judge in his judicial capacity, the act was not one normally performed by a judge. *Id.* Six years later, the court overturned *Rankin* in Ashelman v. Pope, 793 F.2d 1072 (9th Cir. 1986) (en banc). The *Ashelman* court pointed out its mistake in *Rankin*: "[F]or purposes of applying immunity, we focused not on the judge's ultimate acts which appeared to be judicial, but rather on the underlying agreement to conspire which *Rankin* declared to be nonjudicial." *Id.* at 1076. The *Ashelman* court also implicitly rejected the *Rankin* court's analysis of whether the judge had personal jurisdiction over the plaintiff, stating: "As long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction, immunity applies." *Id.* at 1078.

The experience in the Eleventh Circuit is similar. In *Dykes v. Hosemann*, a three-judge panel held that a judge was not immune from suit because he had not obtained the requisite personal jurisdiction, although he had obtained subject matter jurisdiction. 743 F.2d 1488, 1497 (11th Cir. 1984) ("We conclude that a judge who acts in the clear and complete absence of personal jurisdiction loses his judicial immunity."). The panel also concluded that a judge loses immunity only when the judge knows he is acting without jurisdiction. *Id.* (citing Rankin v. Howard, 633 F.2d 844, 849 (9th Cir. 1980)). In reversing the panel's decision on rehearing, the Eleventh Circuit inferred that the *Stump* Court's jurisdiction analysis referred only to subject matter jurisdiction. *Dykes*, 776 F.2d 942, 947-48 (11th Cir. 1985) (per curiam) (en banc) (citing to Stump v. Sparkman, 435 U.S. 349, 356-57 (1978)), *cert. denied sub nom.* Dykes v. Dykes, 479 U.S. 983 (1986). The court ruled that since the judge had acted with subject matter jurisdiction, he did not lose judicial immunity. *Id.* at 949-50.

Moreover, the Eleventh Circuit looked to the four factors used by the Fifth Circuit in identifying whether a judicial act had been performed. *Id.* at 945-46 (citing Harper v. Merckle, 638 F.2d 848, 858 (5th Cir.) (citation omitted), *cert. denied*, 454 U.S. 816 (1981). Thus, both the Fifth and Eleventh Circuits felt the need to adopt four "pre-*Stump*" factors even after *Stump* supposedly refined the doctrine.

5. Under the *Stump* jurisdiction analysis, confusion does not revolve around the issue of personal versus subject matter jurisdiction, since most commentators agree that *Stump* applies exclusively to subject matter jurisdiction. *See* Shaman, *supra* note 3, at 7. Instead, criticism of the jurisdiction element in *Stump* focuses on the procedural flaws performed by the judge. *See* Schuck, *supra* note 3, at 663 (stating that the jurisdictional element is satisfied in *Stump* even where judicial conduct "can only be described as extreme and outrageous"); Rosenberg, *supra* note 3, at 835, 836 (The jurisdictional limitation "is barely any limitation at all. . . . *Stump* is a possible invitation to judicial lawlessness."). One commen-

Then, last October, the Court simply added to the confusion with its decision in *Mireles v. Waco*, holding that a judge was immune from liability for allegedly authorizing the police to use excessive force to hail an attorney into court.[6]

Howard Waco, a deputy public defender in Van Nuys, California, appeared in the Van Nuys Superior Court at 9:00 a.m. on November 6, 1989. The bailiff informed him that his client, charged with a parole violation, had missed the jail bus and would not be present until 1:30 that afternoon. A few minutes later, two Los Angeles County police officers approached Waco in the hallway and told him that Judge Raymond Mireles had requested Waco to appear before his court. Waco informed the officers that because his client was absent, he would be in Judge Alan Haber's courtroom addressing a procedural matter for another client who was facing the death penalty.[7]

Waco proceeded to Haber's courtroom. Meanwhile, Judge Mireles, angered that Waco had failed to appear, authorized the two officers to bring him a "piece" or a "body part" of Waco.[8] Although Mireles may have been joking,[9] the police officers took his order seriously.[10] A *Los Angeles Times* news report described the resulting scene:

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tator has argued for the elimination of the jurisdiction analysis. *See* Block, *supra* note 3, at 921.

Criticism of the judicial act portion of the test has been widespread. *See id.* at 920 (arguing that *Stump*'s brief legacy "has been disarray and dissatisfaction" because of its "inadvertent redefinition of the concept of judicial act"); *see also* Calvin T. Wilson, *Judicial Immunity — To Be Or Not To Be*, 25 How. L.J. 809, 816 (1982) (noting that the "divergent opinions" of the *Stump* justices "as to the definition of 'judicial act' illustrate the existing confusion as to the actual meaning of the term, and therefore, the exact scope and spectrum of protected actions"); Pucci, *supra* note 3, at 631-33 & nn.73-80 (discussing the types of problems courts and commentators have encountered in applying the *Stump* formulation of judicial act).

The *Stump* judicial act formula has been criticized particularly in the context of judges' employment decisions. *See* Pucci, *supra* note 3, at 621 (contending that employment decisions of judges are beyond the traditional context of judicial acts); Robert S. Glazier, Note, *An Argument Against Judicial Immunity for Employment Decisions*, 11 Nova L. Rev. 1126, 1134 (1987) (stating that " 'Universal' rules may not be a realistic goal" in the employment context). In 1988, the United States Supreme Court removed the protection of judicial immunity from employment decisions, characterizing them as "administrative acts." Forrester v. White, 484 U.S. 219, 229-30 (1988).

6. 112 S. Ct. 286, 289 (1991) (per curiam).

7. Patricia K. Lerner, *A Peremptory Summons Leaves Court in an Uproar*, L.A. Times, Nov. 7, 1989, at B3. Since the case against Judge Mireles never went to trial, the facts have not been judicially determined.

8. *Id.*

9. Two witnesses felt that Judge Mireles was joking. *Id.* Judge Mireles later told the reporter that he was only joking. Patricia Lerner, *Judge Says Boycott Threat Unique*, L.A. Times, Dec. 3, 1989, at B3.

10. Lerner, *supra* note 7.

> As shocked courtroom personnel and spectators looked on, the two officers grabbed Waco and pulled him from Haber's courtroom. . . .
>
> The officers dragged the protesting public defender, still clutching his legal files, backward down the hall and into Mireles' courtroom. The officers pushed Waco into the courtroom, causing a deputy district attorney to scramble out of the way and Waco to suffer a bruised leg. . . .[11]

The incident prompted Waco to sue Mireles and the two officers in federal court under section 1983 of the Civil Rights Act.[12] The district court judge, citing the doctrine of judicial immunity, dismissed Waco's suit against Mireles for failure to state a claim.[13] However, the Ninth Circuit Court of Appeals reversed, ruling that if Mireles authorized the use of excessive force, then he acted beyond his judicial capacity and was not immune from suit.[14] The Supreme Court, in a five-to-three decision rendered without briefing and argument, reversed the court of appeals.[15]

This Casenote addresses the Supreme Court's analysis and disposition of *Mireles v. Waco*. Part II of the note considers whether dismissal of Waco's claim was faithful to the policies underlying judicial immunity.[16] Part II also analyzes the Court's application of the judicial immunity test and suggests that the Court either broadly applied the test or signifi-

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11. *Id.*

12. *Lawyer Sues Judge, Police for $400,000*, UPI, Dec. 5, 1989, (*available in* LEXIS, Nexis library, UPI file). Waco also sued the two officers. *Id.* By that time, Judge Haber had decided not to hold the officers in contempt. Patricia K. Lerner, *Judge Won't Cite Two Who Dragged Off Attorney*, L.A. TIMES, Nov. 18, 1989, at B3. The public defender's office also threatened a boycott and unsuccessfully tried to get Judge Mireles removed from the Van Nuys bench. Patricia K. Lerner, *Public Defender Says Boycott Threat Unique*, L.A. TIMES, Dec. 3, 1989, at B3. In denying the removal, the presiding judge reassigned Judge Mireles' criminal docket so that he would not hear cases involving the public defender's office. *Id.* This action lasted nine months. Patricia K. Lerner, *Public Defender's Office Lifts First Boycott of Judge*, L.A. TIMES, Oct. 17, 1990, at B3 (stating that the boycott ended in early September 1990).

Soon after he filed suit, Waco was transferred against his will to the San Fernandino public defender's office. Patricia K. Lerner, *Controversial Public Defender Transferred From Van Nuys Court*, L.A. TIMES, Dec. 21, 1989, at B3. Almost a year after the incident, Judge Mireles was reassigned to a downtown Los Angeles criminal courts building. Patricia K. Lerner, *Once-Boycotted Judge to be Transferred*, L.A. TIMES, Oct. 27, 1990, at B8.

13. *See* Waco v. Baltad, 934 F.2d 214, 215 (9th Cir. 1991) (per curiam).

14. *Id.* at 216.

15. Mireles v. Waco, 112 S. Ct. 289 (per curiam), *rev'g* Waco v. Baltad, 934 F.2d 214 (9th Cir. 1991) (per curiam). The case was decided during the interval between Justice Thurgood Marshall's retirement from the Court and Justice Clarence Thomas' appointment to the Court. Justice Stevens dissented on the merits of judicial immunity. *Id.* at 289-90 (Stevens, J., dissenting). Justice Scalia, with whom Justice Kennedy agreed, dissented on the disposition of the case by summary reversal. *Id.* at 290 (Scalia, J., dissenting).

For the purposes of this Casenote, the Ninth Circuit's decision will be referred to as *Baltad*, while the Supreme Court's decision will be referred to as *Mireles*.

16. *See infra* notes 20-54 and accompanying text.

cantly altered it.[17] Part III discusses how summary reversal of this case affects the doctrine of judicial immunity.[18] Finally, Part IV predicts the precedential impact of the case.[19]

II. JUDICIAL IMMUNITY

The doctrine of judicial immunity is not a defense to a particular cause of action but a shield to protect judges from having to defend a suit at all. It operates as an absolute shield for judges[20] only when they function in a judicial capacity[21] and it applies only to suits for monetary damages.[22] While the official claiming immunity has the burden of proving that such immunity applies, the doctrine is nevertheless broadly construed.[23]

The doctrine is not abrogated upon allegations of malice toward a party[24] or conspiracy against a litigant.[25] Yet the immunity exists "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence, and without fear of consequences."[26]

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17. *See infra* notes 55-105 and accompanying text.

18. *See infra* notes 106-28 and accompanying text.

19. *See infra* notes 129-38 and accompanying text.

20. Judicial immunity also applies: to administrative law judges and other executive officials acting quasi-judicially, Butz v. Economou, 438 U.S. 478, 513-14 (1978); to prosecutors, Imbler v. Pachtman, 424 U.S. 409, 430 (1976); and to advocates and witnesses, Forrester v. White, 484 U.S. 219, 226 (1988) (citing Briscoe v. LaHue, 460 U.S. 325 (1983); *Butz*, 438 U.S. at 512).

21. Stump v. Sparkman, 435 U.S. 349, 360 (1978). A judge will enjoy absolute legislative immunity when he acts in a legislative capacity. Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 734 (1980). Judges enjoy qualified immunity when they act in an enforcement capacity, *id.* at 738, or an administrative capacity, *Forrester*, 484 U.S. at 229-30; *see also* Schuck, *supra* note 3, at 664 (discussing qualified immunity of judges). In distinguishing immunity doctrines, the Court focuses on "the nature of the function performed, not the identity of the actor who performed it." *Forrester*, 484 U.S. at 229.

22. Judicial immunity does not apply to injunctive and declaratory relief, or to attorney's fees and costs. Pulliam v. Allen, 466 U.S. 522, 536-43 (1984). Nor does judicial immunity insulate judges from criminal prosecutions. *Ex Parte* Virginia, 100 U.S. 339, 348-49 (1879); *see also* Glazier, *supra* note 5, at 1132 (summarizing the law of judicial immunity).

23. *See Forrester*, 484 U.S. at 224 (holding that the burden is on the official seeking immunity); *id.* at 225-26 (discussing the sweeping form of immunity enjoyed by judges, and its extension to non-judges); *see also Stump*, 435 U.S. at 356 (stating that a judge's jurisdiction is construed broadly in context of immunity); Schuck, *supra* note 3, at 665 ("I have found only a handful of lower federal court cases since *Stump* in which absolute judicial immunity has been denied . . . and all involved allegations of extreme judicial misbehavior . . . ."). *But see* Glazier, *supra* note 5, at 1141 (suggesting that courts do not agree whether immunity should be broadly construed).

24. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

25. Dennis v. Sparks, 449 U.S. 24, 27 (1980).

26. *Bradley*, 80 U.S. (13 Wall) at 349 n.I (quoting Scott v. Stansfield, L.R. 3 Ex. 219, 222 (1868)).

A. *Justifications for Judicial Immunity*

In *Forrester v. White*,[27] Justice Sandra Day O'Connor cogently explained the justifications for the doctrine of judicial immunity:

> The purposes served by judicial immunity from liability for damages have been variously described . . . . [T]he Court [has persistently] emphasized that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have . . . . If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. . . . The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication. Nor are suits against judges the only available means through which litigants can protect themselves from the consequences of judicial error. Most judicial mistakes . . . are open to . . . [appellate] review, which [is] largely free of the harmful side-effects inevitably associated with exposing judges to personal liability.[28]

As Justice O'Connor indicated, the purposes of the doctrine should not be taken lightly. One commentator has persuasively argued that judicial immunity is very important to American society.[29] Its significance arises from the respect Americans have for the judiciary, and the immense responsibility that judges have "as the true guardians, oracles, and embodiments of the law. Their special province, conceded by all, is the protection of individual rights against public and private over-reaching."[30]

Justice O'Connor's characterization of the doctrine underscores three of the most significant purposes of judicial indepen-

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27. Forrester v. White, 484 U.S. 219 (1988).

28. *Id.* at 226-27 (citations omitted); *see also* Pierson v. Ray, 386 U.S. 547, 564 & n.4 (1967) (Douglas, J., dissenting) (citing Edward G. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1937)). Justice Douglas argued that judicial immunity should extend only to acts that are "necessary to preserve an independent judiciary." *Id.* at 564. In a footnote, Justice Douglas explained:

> Other justifications for the doctrine of absolute immunity have been advanced: (1) preventing the threat of suit from influencing decision; (2) protecting judges from liability for honest mistakes; (3) relieving judges of the time and expense of defending suits; (4) removing an impediment to responsible men entering the judiciary; (5) necessity of finality; (6) appellate review is satisfactory remedy; (7) the judge's duty to the public and not to the individual; (8) judicial self-protection; (9) separation of powers.

Id. at 564 n.4 (citation omitted).

29. Schuck, *supra* note 3, at 658-60.

30. *Id.* at 659.

dence,[31] freedom from vexatious litigation,[32] and the availability of alternate remedies.[33]

Judicial independence, though exaggerated, is the most widely recognized justification for retaining the doctrine of judicial immunity.[34] In *Stump v. Sparkman*, the Supreme Court stated that the doctrine is essential to "the proper administration of justice" because it allows judges "to be free to act upon [their] own convictions, without apprehension of personal consequences."[35] In its purest form, this justification recognizes the necessity that judges remain free from the political and pecuniary pressures of the outside world.[36]

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31. *See* Stump v. Sparkman, 435 U.S. 349, 370 (1978) (Powell, J., dissenting) (stating that the rationale underlying immunity "is the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary"). *But cf.* Shaman, *supra* note 3, at 3-4 (questioning whether absolute immunity is necessary to protect, inter alia, judicial independence). *See also infra* notes 34-36 & 49 and accompanying text.

32. *See* Dennis v. Sparks, 449 U.S. 24, 31 (1980) (contending that a judge should be able to decide "the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted . . . with malice and corruption"); *Pierson*, 386 U.S. at 554 (stating that a judge "should not have to fear that unsatisfied litigants may hound him with litigation"); Rene R. Gilliam, Comment, *Judicial Immunity — The Unworkability of the Current Test*, 16 MEM. ST. U. L. REV. 553, 556 (1986) (citing *Bradley* 80 U.S. (13 Wall.) at 351) ("[M]alicious or corrupt motives could always be alleged, thereby subjecting judges to vexatious litigation."); *see also infra* notes 37-39 & 50-51 and accompanying text.

33. *Stump*, 435 U.S. at 369-70 (Stewart, J., and Powell, J., dissenting) (lamenting the plaintiff's unavailability of appellate review); *accord Pierson*, 386 U.S. at 554 (stating that only a judge's "errors [should] be corrected on appeal"); *see also* Schuck, *supra* note 3, at 668-71 (discussing the availability of judicial conduct boards, criminal prosecution, and impeachment for controlling judicial misconduct); *see infra* notes 40-48 & 52 and accompanying text.

34. *See* Shaman, *supra* note 3, at 4 (citing C. WOLFRAM, MODERN LEGAL ETHICS 970 (1986)) (stating that "the most important purpose of judicial immunity is to protect judicial independence"); Schuck, *supra* note 3, at 659-60 (discussing the exaggerated, yet powerful, perception of judicial independence).

35. Stump v. Sparkman, 435 U.S. 349, 363 (1978) (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871)). The notion of judicial independence caused Judge Phillip Roth to protest vehemently against what he perceived to be a recent narrowing of the scope of immunity. Phillip J. Roth, *The Dangerous Erosion of Judicial Immunity*, 18 BRIEF 26 (Winter 1989). The judge points to several developments that have diminished the scope of judicial immunity. The judge especially criticizes the increasing fluidity in characterizing judicial acts and functions and the allowance of attorney's fees and injunctions. *Id.* at 29-31. According to Judge Roth, the danger of the present judicial immunity rule is that in "allow[ing] inquiry into the judge's capacity . . . and mental state", a judge may "structure his or her rulings to avoid being sued." *Id.* at 31. "This," he concludes, "constitutes the loss of judicial independence." *Id.*

36. *See* Schuck, *supra* note 3, at 659 (citing Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and the Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1377-84 (1987)) (noting the perception of "the judiciary as a citadel of principle under siege by the forces of materialism and political pragmatism").

The second justification of the judicial immunity doctrine, freedom from vexatious litigation, is closely related to the first. Similar to the notion of independence, it insulates a judge from the honest mistakes he or she may commit in the course of hearing a case.[37] It provides that a judge should be able to act without fear that another judge, in a collateral suit, may find him or her liable for injuries resulting from "wrongly-decided" or "procedurally-flawed" cases.[38] A contrary policy allowing disgruntled litigants to sue judges could result in massive and vexatious litigation and could jeopardize the finality of judgments.[39]

The third justification arises out of the first two. The doctrine encourages the use of mechanisms other than filing suit to correct judicial conduct. The availability of appellate review is the main safeguard that counterbalances the shield of judicial immunity.[40] Yet, the Court has rarely invoked the absence of appellate review as a ground for denying immunity.[41] For instance, in *Stump v. Sparkman*,[42] the impossibility of redress through appeal did not preclude the Court from allowing judicial immunity. *Stump* centered on a judge's ex parte permission to sterilize a slightly retarded girl.[43] The strong dissenting opinions of Justices Stewart and Powell emphasized that the sterilized girl did not have the benefits of appellate review available to her.[44]

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37. *See* Forrester v. White, 484 U.S. 219, 225 (1988) (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 348 (1871)) ("Besides protecting the finality of judgments or discouraging inappropriate collateral attacks, the *Bradley* Court concluded judicial immunity also protected judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants.").

38. *See id.* at 225 (asserting that "[j]udicial immunity apparently originated . . . as a device for discouraging collateral attacks").

39. *See* Shaman, *supra* note 3, at 4 (stating that "[e]nsuring the finality of judgments may be a valid goal").

40. Judicial immunity developed alongside appellate review and largely helped to replace amercements, or fines, against judges for false judgments. *See* Block, *supra* note 3, at 881-87.

41. Even the *Forrester* Court, which recognized the availability of appeal as an important purpose for judicial immunity, did not accord any significance to the fact that the plaintiff, who alleged that a judge wrongfully fired her, did not have the availability of appellate review. *Forrester*, 484 U.S. at 225-27. Instead, the Court held that the judge had no immunity for his employment decisions because such decisions were administrative in nature. *Id.* at 229-30.

42. 435 U.S. 349 (1978).

43. *Id.* at 351-53.

44. Justice Stewart had trouble squaring the case with *Pierson*: "Not one of the considerations thus summarized in the *Pierson* opinion was present here. There was no 'case,' controversial or otherwise. There were no litigants. *There was and could be no appeal.*" *Id.* at 368-69 (Stewart, J., dissenting) (emphasis added). Justice Powell found the decision inconsistent with the policy of *Bradley*: "But where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies . . . the underlying assumption of the *Bradley* doctrine is inoperable." *Id.* at 370 (Powell, J., dissenting).

Furthermore, resort to other mechanisms, such as sanctioning by judicial conduct boards, prosecution for criminal misconduct, and impeachment, does not adequately justify judicial immunity.[45] The principal problem with these alternate remedies is that while they punish judicial misconduct they do not compensate the victims of misconduct.[46] Judicial conduct boards have received wide criticism for their flaccid punitive effect.[47] In addition, judges facing criminal charges and impeachment may continue to sit on the bench.[48] Thus, the third justification exists as a shield for immunity, not as a sword against immunity.

Trying to reconcile *Mireles* with these justifications proves difficult. Certainly, the decision does not appear to further any of the justifications for judicial immunity. Judge Mireles did not exercise the type of judgment reasonably attributed to an independent judiciary.[49] In fact, he did not render a judgment on a case before him. It is difficult, therefore, to discern how Waco's charges threatened Mireles' judicial independence.

In a similar vein, Waco did not bring suit to cure any substantive or procedural error that he felt the judge had committed. His suit merely alleged that Judge Mireles had authorized two police officers to commit a battery.[50] The suit was neither vexatious nor brought by a disgruntled litigant. It was a personal injury action brought by an injured person against an alleged tortfeasor. Although the alleged tortfeasor happened to be a judge, that status by itself should not have mandated immunity.[51]

Finally, Waco did not have access to the appellate process to correct Judge Mireles' alleged misconduct. And although the California Commission on Judicial Performance publicly rebuked Judge Mireles,[52] the rebuke did not compensate Waco for the injury that the judge allegedly

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45. *Accord* Schuck, *supra* note 3, at 668-71 (discussing the pitfalls of existing regulatory and penal approaches to judicial misconduct).

46. *Id.* at 668-70.

47. *Id.* at 669 (showing that these mechanisms serve little deterrent effect because rates of investigative activity are low and the sanctions are weak).

48. Shaman, *supra* note 3, at 20 (citing United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974)).

49. As Justice Stewart might have said, "[T]here was not even the pretext of principled decision-making." Stump v. Sparkman, 435 U.S. 349, 369 (1978) (Stewart, J., dissenting).

50. Mireles v. Waco, 112 S. Ct. 286, 287 (1991) (per curiam).

51. Writing for the *Forrester* majority, Justice O'Connor explained: "Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." Forrester v. White, 484 U.S. at 219, 227 (1988) (emphasis in original).

52. *See* Aaron Curtiss, *Judge Rebuked for Courtroom Incident*, L.A. TIMES, June 26, 1990, at B3. The Commission issued a statement explaining that "Judge Mireles had been careless . . . by making remarks which he considered jocular but were capable of being, and apparently were, misunderstood." *Id.* The Commission also stated that the judge's remark "created in the officers the impression and belief that Judge Mireles had authorized their use of physical force." *Id.*

inflicted upon him. Thus, the Supreme Court's decision precluded Waco from obtaining the only available redress from the judge's actions.

Conversely, one could argue that the Court's dismissal of Waco's claim did not frustrate the doctrine of judicial immunity.[53] The proposition that the decision undermined judicial independence, or that it would spur vexatious litigation against judges, would seem specious. Certainly, dismissing Waco's claim cannot be said to restrict a judge's independent decisional process. Nor would the dismissal likely produce a rush of claims against judges. Moreover, the unavailability of redress does not usually bar the application of judicial immunity.[54] The real problem with the case, if there is one, is the decision's apparent failure to be justified on policy grounds alone.

B. *The Test for Judicial Immunity*

The lack of public policy justifications in *Mireles* suggests that the Supreme Court either altered or broadly applied the current judicial immunity test[55] articulated in *Stump v. Sparkman*.[56] Immunity applies where the judge 1) performs a "judicial act" and 2) does not act "in the clear absence of all jurisdiction."[57]

1. Judicial Act

The first prong of the judicial immunity test requires that the action in question be a "judicial act." The *Stump* decision identified two factors in determining whether a particular act constitutes a judicial one: first, the "nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and . . . [second,] the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity."[58]

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53. An argument could be made that the extension of judicial immunity in *Mireles* works to detract from the public image of the judiciary as a whole. *Cf.* Block, *supra* note 3, at 880 (suggesting that "the most apparent effect of [*Stump*] has been . . . to call into question the integrity of the judiciary and the judicial process"); *see also* Glazier, *supra* note 5, at 1151-52 ("It is important to recognize, however, that respect for the law may decline as people in power are held to be immune from the laws.").

54. *See supra* notes 41-44 and accompanying text.

55. Of course, the assertion that policy does not justify the outcome of this case may also suggest that the test itself is flawed, as some commentators have suggested. Feinman & Cohen, *supra* note 3, at 256 (stating that the *Stump* analysis is unfaithful to policy concerns); Pucci, *supra* note 3, at 633 (remarking that the justifications for judicial immunity are not a central concern in the *Stump* analysis).

56. 435 U.S. 349 (1978).

57. *Id.* at 357.

58. Stump v. Sparkman, 435 U.S. 349, 362 (1978), *quoted in Mireles*, 112 S. Ct. at 288 (emphasis in original).

This characterization of a judicial act has been widely criticized.[59] Justice Stewart, dissenting in *Stump*, stated that he thought the prong was "legally unsound."[60] Commentators have consistently supported the use of different factors to determine whether an act is judicial.[61] In fact, some federal circuit courts use additional factors to determine whether an act is judicial.[62] Two commentators have argued that the test should be applied to specific, rather than general, characterizations of the facts.[63]

The *Mireles* Court ignored these concerns when it analyzed the first factor of the judicial act prong. Nevertheless, in analyzing the second factor, the Court properly concluded that Judge Mireles had acted in his judicial capacity, and that Waco had dealt with the judge qua judge.[64] Looking, then, solely at the Court's analysis of whether the judge's act was a normative function of judging illuminates the concerns that courts and commentators have expressed regarding the judicial act prong and the judicial immunity test as a whole.

The Court limited the facts alleged by Waco to a judge's mere authorization to hail an attorney before the court. Characterizing Judge Mireles' action in this limited manner ignores the thrust of Waco's claim that the authorization empowered the police officers to use excessive force. As a result, the Court concluded that Judges Mireles had performed a judicial act for which he was immune from liability. In doing so, the Court was not wholly faithful to the precedent it cited in reaching its conclusion.

The Court had indicated in *Stump* that the first factor of the judicial act prong focuses upon the function and the type of act performed by the judge. The Court held that "Judge Stump was performing a 'function' normally performed by judges and that he was taking 'the type of action'

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59. *See supra* note 5.

60. *Stump*, 435 U.S. at 365 (Stewart, J., dissenting).

61. The criticism mainly revolves around the absence of any consideration of a judge's decisional discretion and judgment. *See* Pucci, *supra* note 3, at 631-32 & nn.73-74.

62. The Fifth, Ninth, and Eleventh Circuits consider four factors:

> whether: (1) the act complained of is a normal judicial function; (2) the events occurred in the judge's court or chambers; (3) the controversy centered around a case then pending before the judge, and (4) the confrontation arose directly and immediately out of a visit to the judge in his judicial capacity.

Brewer v. Blackwell, 692 F.2d 387, 396-97 (5th Cir. 1982) (citations omitted); *see also* Ashelman v. Pope, 793 F.2d 1072, 1075-76 (9th Cir. 1986) (en banc); Harris v. Deveaux, 780 F.2d 911, 914 (11th Cir. 1986); Dykes v. Hosemann, 776 F.2d 942, 946 (5th Cir. 1985), *cert. denied sub nom.*, Dykes v. Dykes, 479 U.S. 983 (1986). Interestingly, the Ninth Circuit did not use these factors in deciding *Baltad*. *See* Waco v. Baltad, 934 F.2d 214 (9th Cir. 1991).

63. The thrust of this argument is that judicial acts should be analyzed specifically rather than looking to "normal" or "general" acts of judges as is done in legislative immunity analysis. *See* Robert F. Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237, 242-44 (1978); Gilliam, *supra* note 32, at 562.

64. *Mireles*, 112 S. Ct. 286, 288 (1991) (per curiam) (stating that "Waco . . . was dealing with Judge Mireles in the judge's judicial capacity").

judges normally perform."[65] In *Mireles*, the Court reformulated this factor: "[T]he relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.' . . . In other words we look to the act's relation to a general function normally performed by a judge. . . ."[66] Under the *Mireles* formulation, subsequent courts addressing the judicial act prong must perform the impossible task of analyzing the nature and function of the act, while simultaneously ignoring the act alleged.

The *Stump* decision does not strongly support this proposition. In *Stump*, the Court focused on the nature of the act, the function of the act, *and* the act itself: "The Indiana law vested in Judge Stump the power to entertain and act upon the petition for sterilization. He is, therefore, . . . immune from damages even if his approval of the petition was in error."[67] In other words, the *Stump* Court rested its ruling, in part, upon the specific act that the plaintiff alleged — acting on and approving a petition for sterilization.

The *Stump* Court also contrasted this alleged act with the act performed by the judge in *Gregory v. Thompson*.[68] There, the Ninth Circuit Court of Appeals ruled that a judge's removal of a litigant from his courtroom by force was "simply not an act of a judicial nature."[69]

In addition, the Supreme Court previously let stand the Fifth Circuit's decision in *Ammons v. Baldwin*.[70] The *Ammons* court held that a judge did not retain immunity upon threatening a litigant with the use of force.[71] Thus, the Supreme Court undeniably looked, at least in part, to the specific act alleged when it rendered its decision in *Stump*, expressed its approval in *Gregory*, and denied certiorari in *Ammons*.

Moreover, squaring the *Mireles* decision with *Gregory* and *Ammons* presents a formidable challenge since the Ninth Circuit principally relied on these cases in deciding *Waco v. Baltad*.[72] The *Mireles* formulation apparently would distinguish *Gregory* and *Ammons* by ignoring the act itself and by characterizing the act generally. The *Mireles* Court shrouds its general characterization of the act in terms of the act's function, "the function of directing police officers to bring counsel in a pending case before the court."[73] The judges in *Gregory* and *Ammons* performed similar functions; yet the specific acts that they performed, the direct use and

65. *Stump*, 435 U.S. at 362 n.11.

66. *Mireles*, 112 S. Ct. at 288-89 (citing Stump v. Sparkman, 435 U.S. 349, 362 (1978)).

67. *Stump*, 435 U.S. at 364.

68. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); *see Stump*, 435 U.S. at 361 n.10.

69. *Gregory*, 500 F.2d at 64. The Ninth Circuit said that this act was "simply not an act of a judicial nature." *Id.*

70. 705 F.2d 1445 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

71. *Id.* at 1448.

72. 934 F.2d 214, 215-16 (9th Cir. 1991).

73. Mireles v. Waco, 112 S. Ct. 286, 289 (1991) (per curiam).

threat of force, were precisely what caused those judges to lose immunity. Thus, the acts in both *Gregory* and *Ammons* conceivably could receive protection under the *Mireles* formulation. Alternatively, *Gregory* and *Ammons* could be distinguished on the grounds that those judges directly used or threatened force on a litigant, whereas Judge Mireles merely authorized the use of force on an attorney.

Briefly dissenting in *Mireles*, Justice Stevens also found problematic the majority's over-generalization of the facts alleged by Waco. He divided Judge Mireles' action into two acts. The first act, hailing Waco before the court, was an act to which immunity should attach.[74] However, Justice Stevens aptly stated that it was "undeniable that no immunity would attach to" the judge's second act, "[o]rdering a battery."[75]

The Court's characterization of Judge Mireles' act is confusing in one other way. The Court cited to *Stump* and *Forrester* for the proposition that an act is not less judicial because it is allegedly malicious or corrupt.[76] The Court's reliance on *Stump* is misplaced since the *Stump* Court asserted this proposition in its analysis of the jurisdiction prong.[77] Reliance on *Forrester* is also misplaced since that case did not address the motive or intent of the judge's act. Rather, *Forrester* dealt solely with whether the judge acted in an administrative or judicial capacity.[78]

Citation to Forrester is also misplaced because the *Forrester* decision is not relevant to the *Mireles* case. *Forrester* dealt exclusively with the second factor of the judicial act prong, the capacity of the judge and the expectation of the parties.[79] In contrast, *Mireles* dealt primarily with the nature and function of the act, the first factor of the judicial act prong.[80]

Moreover, the proposition that an act is not less judicial because of a judge's malicious or corrupt intention, is irrelevant to Waco's suit against Mireles. Evidence of malice or corruption would be unnecessary to prove Waco's allegation of battery under color of law. Therefore, the Court's assertion of this proposition is problematic in three ways: *Stump* and *Forrester* do not lend strong support to the proposition; the *Forrester*

74. *Id.* at 289 (1991) (Stevens, J., dissenting).

75. *Id.*

76. *Id.* at 288 (citing Stump v. Sparkman, 435 S. Ct. 349, 356 (1978); Forrester v. White, 484 U.S. 219, 227 (1988)).

77. The *Stump* analysis had not yet reached the judicial act prong of the test. *See Stump*, 435 U.S. at 355-60 (jurisdiction analysis); *id.* at 360-64 (judicial act analysis).

78. Forrester v. White, 484 U.S. 219. 229 (188). In *Forrester*, the Court characterized a judge's hiring and firing of employees as administrative in nature and held that judges enjoy qualified administrative immunity for employment decisions, not absolute judicial immunity for judicial acts. *Id.* Thus, the *Forrester* Court addressed the judge's capacity to act, not the judge's action.

79. *Id.*

80. *Mireles*, 112 S. Ct. at 288.

decision is inapposite to the act-characterizing focus of *Mireles*; and the proposition itself is irrelevant to the *Mireles* cause of action.

Although this Casenote's analysis could be considered hypersensitive, nevertheless the precedential value of a summary reversal[81] compels a hard look into every nuance of the Court's per curiam opinion. Scrutinizing the Court's analysis of the judicial act prong reveals that the *Mireles* majority struggled to explain clearly and cogently that prong of the judicial immunity test. As a result, the *Mireles* Court's analytical legacy is both disconcerting and confusing.

2. Jurisdiction

Under the second prong of the test, a judge "will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' "[82] This prong grew out of the common law doctrine in England that granted absolute immunity to judges in courts of general jurisdiction and granted qualified, or partial, immunity for judges sitting in courts of limited jurisdiction.[83] However, in 1872, the Court's *Bradley v. Fisher* decision[84] commenced a gradual erosion of the distinction between general and limited jurisdiction.

In *Bradley*, the Court held that a judge sitting in a court of general jurisdiction had absolute immunity for "judicial acts" taken "in excess of jurisdiction," but not for acts taken "in absence of jurisdiction."[85] The Court applied the *Bradley* absolute immunity rule 115 years later in *Pierson v. Ray*[86] where the judge sat in a court of limited jurisdiction. Thus, by 1967, the Supreme Court ceased to recognize a distinction between courts of general and courts of limited jurisdiction.[87]

The Court further extended the *Bradley* rule in two significant ways in 1978. First, in *Butz v. Economou*,[88] the Court applied judicial immunity to administrative law judges, thereby extending the jurisdictional element beyond the courtroom and into the hearing room. And second, in *Stump*, the fact that state law did not *prohibit* the judge from hearing the case

81. *See infra* notes 131-34 and accompanying text.

82. *Id.* at 356-57 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871)).

83. *See* Feinman & Cohen, *supra* note 3, at 205-18; Block, *supra* note 3, at 892-96.

84. 80 U.S. (13 Wall.) 335 (1871); *see* Schuck, *supra* note 3, at 662-65.

85. Schuck, *supra* note 3, at 663; *see also Bradley*, 80 U.S. (13 Wall.) at 351-53 (distinguishing between "excess of jurisdiction" and "clear absence of all jurisdiction"); Pucci, *supra* note 3, at 625-26 (stating that the existence of subject matter jurisdiction alone satisfied the jurisdictional element in *Bradley*).

86. 386 U.S. 547, 553-54 (1967).

87. *See* Schuck, *supra* note 3, at 663.

88. 438 U.S. 478 (1978).

was sufficient to infer that the court did not act in the clear absence of subject matter jurisdiction.[89]

In *Mireles*, the Court briefly disposed of the jurisdiction issue in two sentences.[90] Analyzing these sentences separately demonstrates the curious contours of the jurisdiction prong. The first sentence states: "If Judge Mireles authorized and ratified the police officers' use of excessive force, he acted in excess of his authority."[91] The principle that a judge can exceed his or her authority without acting in the clear absence of all jurisdiction has been part of judicial immunity jurisprudence since *Bradley*.

In *Bradley*, the judge retained immunity where he acted in the presence of subject matter jurisdiction, even though he exceeded his jurisdiction.[92] The *Bradley* holding emphasized that the validity of the errors could be challenged on appeal or through other mechanisms.[93] In *Stump*, the judge retained immunity despite committing grave procedural errors, since the errors did not interfere with the judge's authority to entertain a mother's petition to sterilize her daughter.[94] The *Stump* Court explained that the jurisdiction question concerned whether authority over the subject matter existed, not whether that authority was properly exercised.[95]

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89. The *Stump* court stated: "[I]t is more significant that there was no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump." Stump v. Sparkman, 435 U.S. 349, 358 (1978).

90. Mireles v. Waco, 112 S. Ct. 286, 289 (1991) (per curiam). The lower level opinion by the Ninth Circuit did not analyze the jurisdiction prong but rested its ruling solely on the basis of whether Judge Mireles performed a "judicial act." Waco v. Baltad, 934 F.2d 214 (9th Cir. 1991) (per curiam). On appeal, the *Mireles* Court, therefore, unnecessarily addressed the jurisdiction prong. Certainly, the Court could have remanded determination of this prong to the Ninth Circuit. But because the Court opted not to remand the case, and because summary reversals by per curiam opinions carry full weight in the lower federal courts, the Court's jurisdiction analysis, though superfluous to its holding, deserves scrutiny.

91. *Id.*

92. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-53 (1871). The *Bradley* Court used an example to demonstrate the distinction between acting in excess of jurisdiction and acting without the existence of jurisdiction. A probate judge who tries criminal offenses acts without jurisdiction. But a criminal judge who imposes a penalty that is not allowed acts in excess of jurisdiction. Thus, the jurisdiction prong of the judicial immunity test is not satisfied in the case of the probate judge, but is satisfied in that of the criminal judge. *Id.* at 352.

93. *Id.* at 354. ("Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies. . . .").

94. The *Stump* Court concluded: "Because the court over which Judge Stump presides is one of general jurisdiction, neither the procedural errors he may have committed nor the lack of a specific statute authorizing his approval of the petition in question rendered him liable in damages for the consequences of his actions." Stump v. Sparkman, 435 U.S. 349, 359-60 (1978).

95. *Id.* at 359 (rejecting the lower court's conclusion that errors in procedural due process are committed in the clear absence of jurisdiction); *see also* Block, *supra* note 3, at 914

The same appears to hold true in the *Mireles* case. There, Judge Mireles had the authority to try Waco's client. As such, the judge had subject matter jurisdiction to hail Waco into court.[96] The fact that Judge Mireles allegedly authorized the use of excessive force (his exercise of authority) is irrelevant to the jurisdictional inquiry (the existence of authority). Whether or not Judge Mireles authorized force in hailing Waco into court, he did not act in the clear absence of all jurisdiction.

The Court, however, confuses its jurisdiction analysis with the second sentence: "But such an action — taken in the very aid of the judge's jurisdiction over a matter before him — cannot be said to have been taken in the absence of jurisdiction."[97] One could interpret this characterization of the facts as extending the jurisdiction analysis a step further than *Bradley* and *Stump*. If Judge Mireles' act was taken in the *aid* of jurisdiction, it could not have been taken *under color of* jurisdiction[98] or *within* jurisdiction.[99] Rather, the act may have been taken before jurisdiction was perfected.

Consequently, the result-oriented language of the second sentence is confusing. On the one hand, the Court could mean that actions taken to bring jurisdiction before a judge can confer jurisdiction over themselves, if jurisdiction is eventually obtained. This would imply a subtle extension of the judicial immunity doctrine which would protect a judge's actions that result in jurisdiction. On the other hand, the Court could mean that actions taken in the aid of jurisdiction are just another example of a judge's improper exercise of authority. Interpreting the Court's analysis in this manner demonstrates a very broad application of the judicial immunity test.

The most puzzling aspect of the Court's analysis of jurisdiction, however, is that it focuses on the act itself as an excessive exercise of authority. Yet, during its analysis of the judicial act prong of the test, the Court minimizes Judge Mireles' act — the authorization of excessive force —

("This argument, the Court recognized, confused the existence of authority with its proper exercise.").

96. *See* CAL. CIV. PROC. CODE § 128(a)(5) (West Supp. 1991) (providing that a court has the power "[t]o control in furtherance of justice, the conduct of its ministerial officers, and *of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto*") (emphasis added).

97. Mireles v. Waco, 112 S. Ct. 286, 289 (1991) (per curiam).

98. *See Bradley*, 80 U.S. (13 Wall.) at 351-53 (stating that immunity attaches even to acts done in excess of jurisdiction if the judge or his court has de jure jurisdiction over the subject matter).

99. *See Stump*, 435 U.S. at 358 (agreeing with the district court that since the approval of the petition was not prohibited by statute, it was included in the jurisdiction).

and focuses instead on a judge's statutory power to bring an attorney before the court — a statute conferring jurisdiction![100]

Thus, the Court confuses the analysis of the judicial immunity test in three ways. First, it broadly construes, or perhaps slightly extends, the jurisdiction analysis.[101] Second, it focuses on the jurisdiction of Judge Mireles in the judicial act portion of the test and focuses on the judicial act in the jurisdiction prong of the test.[102] Third, throughout its judicial act analysis, the Court fails to support its conclusions convincingly, and it characterizes Judge Mireles' action generally.[103]

Justice O'Connor, writing for a unanimous Court in *Forrester*, stated that absolute judicial immunity is "strong medicine," justified only where a great danger exists that officials will be deflected from "the effective performance of their duties."[104] She continues, "The danger here is not enough. To conclude that because a judge acts within the scope of his authority, such [actions] . . . are . . . converted into 'judicial acts,' would lift form above substance."[105] Similarly, Judge Mireles acted within his authority only to bring Waco before the court in a pending case. To assume that his authorization of force was thereby converted into a judicial act also appears to lift form above substance.

III. The Effect of Summary Reversal

Justice O'Connor has also characterized the reversal of cases without plenary consideration as "strong medicine."[106] According to Justice Marshall, "[s]ummary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error."[107] Dissenting in

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100. *Mireles*, 112 S. Ct. at 288. In the California Civil Procedure Code, Part 1 is entitled "Of Courts of Justice." Title 1 of Part 1, entitled "Organization and Jurisdiction," contains the relevant provision, section 128. Section 128, "Powers of Court," appears in Article 2, "Incidental Powers and Duties of Courts," of Chapter 6, "General Provisions Respecting Courts of Justice," of Title 1, Part 1. Section 128 therefore delineates the powers incidental to jurisdiction of courts. On the other hand, Title 2 of Part 1 deals with "Judicial Officers," under which Chapters 2 ("Powers of Judges at Chambers") and 4 ("Incidental Powers and Duties of Judicial Officers") seem more relevant to the judicial capacity factor of the judicial act prong.

101. *See supra* notes 82-99 and accompanying text.

102. *See supra* note 100 and accompanying text.

103. *See supra* notes 59-75 and accompanying text.

104. Forrester v. White, 484 U.S. 219, 230 (1988) (quoting Forrester v. White, 792 F.2d 647, 660 (5th Cir. 1986) (Posner, J., dissenting)).

105. *Id.*

106. Dudley v. Stubbs, 489 U.S. 1034, 1039 (1989) (per curiam) (O'Connor, J., dissenting).

107. Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (per curiam) (Marshall, J., dissenting).

Mireles, Justice Scalia wrote, "The decision here reversed is, at a minimum, not *clearly* in error."[108]

Summary reversal by per curiam opinion is a summary disposition by the Court on the merits of the case.[109] The Court simultaneously grants certiorari, briefly decides the merits, and reverses the case below.[110] When the Court summarily reverses, the parties are not given the opportunity to brief the Court on the merits or to argue orally before the Court.[111] Summary reversal is but one of an arsenal of devices which the Court uses to reduce its enormous caseload.[112]

Like other types of summary disposition, the Court does not give any notice to the parties that the case will be summarily reversed,[113] even though Supreme Court Rule 16.1 warns that the Court possesses the authority to "summarily dispos[e] on the merits" any case after the parties file the petition for certiorari and the brief in opposition.[114] This lack of notice is particularly troublesome since the Justices themselves and commentators constantly "admonish[] the bar" that petitions for certiorari and briefs in opposition should be kept concise.[115] In fact, Rules 14.4 and 15.3 state that these papers should be "as short as possible."[116] The documents are intended only to set forth reasons why the Court should, or should not, grant plenary consideration to the issues involved.[117] As one commentator has noted, "In no event is either the petition or the opposing brief designed to be a brief on the merits."[118]

Justice Brennan has recognized that summary reversal may turn out to be costly and time-consuming:

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108. Mireles v. Waco, 112 S.Ct. 286, 290 (1991) (per curiam) (Scalia, J., dissenting) (emphasis in original).

109. *See* ROBERT L. STERN, ET. AL., SUPREME COURT PRACTICE 280 (BNA) (6th ed. 1986).

110. *Id.*

111. *Id.*

112. The Court may, inter alia, deny certiorari or summarily dispose. *See id.* at 239-46. Besides summary reversals, summary dispositions include summary affirmances and summary reconsideration orders. When the Court summarily reverses or affirms, the Court may issue per curiam opinions or memorandum decisions to explain its holding. *See id.* at 277-87.

113. *Id.* at 280.

114. SUP. CT. R. 16.1, *reprinted in* ROBERT L. STERN, ET. AL., SUPREME COURT RULES: THE 1990 REVISIONS 35-36 (BNA) (1990). Rule 16.1 provides: "After consideration of the papers distributed pursuant to Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits." *Id.*

115. STERN, *supra* note 109, at 285.

116. Rule 14.4 provides: "The petition for writ of certiorari shall be as short as possible and may not exceed the page limitations set out in Rule 33." *See* STERN, *supra* note 114. Rule 15.3 provides: "A brief in opposition shall be as short as possible and may not exceed the page limitations set out in Rule 33." *Id.*

117. *See* SUP. CT. R. 14 (petition) & 15 (brief in opposition).

118. STERN, *supra* note 109, at 285; *see* United States v. Hollywood Motor Car Co., 458 U.S. 263, 271-72 (1982) (per curiam) (Blackmun, J., dissenting).

> Indeed, an increased rate of summary [reversals] may prove to be counterproductive. As the bar becomes alert to the increased probability of summary [reversal], lawyers responding to a petition for certiorari will likely choose to minimize the risk of summary disposition by . . . providing a full statement of their argument on the merits. . . . [T]his will only "mean additional and unnecessary work for the lawyer, expense to the client, and unessential reading matter for an already overburdened Court."[119]

Summary reversal can, therefore, be viewed as a trade-off between the problems attendant to a lack of notice to the parties and the necessity of the Court to reduce its burdensome caseload. In this compromise, the latter consideration prevails.

This balancing act makes it difficult to discern when the Supreme Court will consider a case "ripe" for summary reversal.[120] Per curiam opinions rarely state the factors which contributed to the majority's decision to summarily reverse a particular case.[121] At best, one can infer these factors from the dissenting opinions.[122] The inherent problem with this type of analysis is that dissenting opinions voice only the reasons why summary reversal should *not* be employed. Further difficulty may arise if the individual opinions of the dissenting justices appear to conflict.

The *Mireles* case illustrates well the problems of summary reversal. Justice Scalia's dissent adopts the more deferential view of summary reversal. Under this view, denial of certiorari should supplant summary reversal where the lower court's decision is not clearly erroneous, where the facts are undisputed, and where the law is settled.[123] If this is the appropriate standard, then the majority in *Mireles* must have viewed the Ninth Circuit's decision as clear error.

Another, more restrictive, school of thought would employ summary reversal only when the interests of justice so dictate.[124] This line of reasoning stems from the oft-quoted adage that the Court "is not, and never has been, primarily concerned with the correction of errors in lower court de-

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119. Hutto v. Davis, 454 U.S. 370, 387 n.6 (1982) (per curiam) (Brennan, J., dissenting) (quoting ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 365 (5th ed. 1978) and citing Ernest J. Brown, *Forward: Process of Law*, 72 HARV. L. REV. 77, 81-82 (1958)).

120. STERN, *supra* note 109, at 281 n.79.

121. *Id.* at 281.

122. *Id.*

123. Schweiker v. Hansen, 459 U.S. 785, 791 (1981) (per curiam) (Marshall, J., dissenting). Variations of the "clear error" theory appear in Wyrick v. Fields, 459 U.S. 42, 51 (1982) (per curiam) (Marshall, J., dissenting), and in Johnson v. Chicago Bd. of Educ., 457 U.S. 52, 54 (1982) (per curiam) (Rehnquist, J., dissenting). Stern, Gressman, and Shapiro have observed: "Apparently, then, the clearly erroneous decision correctable by summary reversal should involve an error of greater magnitude than the mere technical, harmless, or parochial error." STERN, *supra* note 109, at 282.

124. *See Johnson*, 457 U.S. at 54 (Rehnquist, J., dissenting).

cisions."[125] Thus, the reason for summary reversal must be found in Title 28, section 2106 of the United States Code, under which error correction becomes part of the Court's power to reverse "as may be just under the circumstances."[126] If this is the proper summary reversal standard, then the *Mireles* majority evidently perceived that justice required judicial immunity to insulate Judge Mireles' action.

A plethora of other protests levied against the employment of summary reversal exist but do not appear to apply to *Mireles*.[127] Nevertheless, the effect of summary reversal in this case has implications far beyond Justice Stevens' difficulty in "articulat[ing] an acceptable theory of discretionary review that would explain" its disposition.[128] The precedential impact of *Mireles* may depend largely upon which theory of summary reversal the Court used to summarily reverse the Ninth Circuit's decision.

IV. THE PRECEDENTIAL IMPACT OF *MIRELES*

As this Casenote suggests, the *Mireles* decision does not clearly indicate whether the Court broadly applied the judicial immunity test or whether the Court altered the test. Either explanation is plausible if coupled with the proper theory of summary reversal. Before the Casenote embarks on this "mating game," however, it is essential to determine how summary reversal generally affects the precedential weight of an individual case.

A summary reversal is a decision on the merits of the case.[129] Therefore, unlike a denial of certiorari, it carries at least a modicum of precedential value.[130] Case law teaches that summary affirmances and dismissals carry full weight with respect to lower courts, but little weight in the Supreme Court itself.[131] When a per curiam opinion accompanies summary dispositions, the Court has admitted that its decisions can be "somewhat opaque."[132]

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125. Chief Justice Fred M. Vinson, Address Before the American Bar Association (Sept. 7, 1949), *quoted in* Boag v. MacDougal, 454 U.S. 364, 368 (1982) (per curiam) (Rehnquist, J., dissenting).

126. 28 U.S.C. § 2106 (1988).

127. *See* STERN, *supra* note 109, at 281-87.

128. Smith v. United States, 112 S. Ct. 667, 667 (1991) (Stevens, J., dissenting) (comparing summary reversals in *Mireles* and Hunter v. Bryant, 112 S. Ct. 534 (1991), with the denial of certiorari in *Smith*).

129. STERN, *supra* note 109, at 280.

130. *Id.* at 242.

131. *See* Hicks v. Miranda, 422 U.S. 332, 344 (1975) (quoting Doe v. Hodgson, 478 F.2d 537, 539, *cert. denied sub nom.* Doe v. Brennan, 414 U.S. 1096 (1973)); *see also* STERN, *supra* note 109, at 246-47 (discussing precedential value within the Supreme Court); *id.* at 247-52 (discussing precedential value in lower courts).

132. Gibson v. Berryhill, 411 U.S. 564, 576 (1973).

Under the "clearly erroneous" theory of summary reversal, it is reasonable to assume that summary dispositions by per curiam opinions command more precedential weight than unexplained summary dispositions.[133] It follows that if the Ninth Circuit below were clearly erroneous in applying the judicial immunity doctrine, then the *Mireles* precedent would be quite strong. If the *Mireles* precedent is indeed strong, and if both the Ninth Circuit and Justice Stevens *clearly erred*, then one must conclude that the *Mireles* Court altered the judicial immunity standard. But, this result is not plausible. The Court would not be acting prudently if it changed a federal common law doctrine through summary reversals and per curiam opinions.

In contrast, utilizing the "interest of justice" theory, Justice William Rehnquist stated in dissent to another per curiam opinion: "It cannot be doubted that this case will have no importance beyond the facts and the parties involved."[134] Under this theory, the facts of the *Mireles* decision become important in demarking its precedential effect. Yet, despite its limitation to the facts, the effect should still be strong because summarily disposed decisions receive full weight in the lower courts. This leads to the conclusion that *Mireles* should be interpreted as an example of the Court's preference to construe broadly allegations levied against a judge.

V. CONCLUSION

The formulation, analysis, and disposition of the *Mireles* decision create more confusion than the case warrants. Justice Scalia was correct: the Court should have decided this case, if at all, only after plenary consideration, or certiorari should have been denied, "since the factual situation it present[ed] [was] so extraordinary that it [did] not warrant the expenditure of [the Court's] time."[135]

If the clearly erroneous theory is correct, and the *Mireles* decision altered the judicial immunity test, the lower courts will undoubtedly struggle to apply the new standard.[136] The jurisdictional element would en-

133. Although summary dispositions without written opinions are inherently problematic in that lower courts have difficulty discerning what the Court is affirming or reversing, they carry some weight as precedent. STERN, *supra* note 109, at 249-52. Presumably, these same dispositions, when clarified by a written opinion, should carry more weight.

134. Boag v. MacDougall, 454 U.S. 364, 368 (1982) (per curiam) (Rehnquist, J., dissenting).

135. Mireles v. Waco, 112 S. Ct. 286, 290 (1991) (per curiam) (Scalia, J., dissenting).

136. Justice Marshall had a similar fear with regard to summarily reversed cases:

> Moreover, by deciding cases summarily, without benefit of oral argument and full briefing, this court runs a great risk of rendering erroneous or ill-advised decisions that may confuse the lower courts: there is no reason to believe that this court is immune from making mistakes, particularly under these kinds of circumstances.

Harris v. Rivera, 454 U.S. 339, 349 (1981) (per curiam) (Marshall, J., dissenting).

compass actions taken without jurisdiction, so long as jurisdiction over the subject matter resulted from the action. The judicial act prong would ignore the act itself, yet would look for a nexus between its nature and a normative judicial function. As such, what the judge actually did would be minimalized to the largest degree possible.

If the interest of justice theory applies, *Mireles* will be limited strictly to its facts. *Mireles* then stands for the proposition that a judge retains immunity even where the judge authorizes an act for which he could be held liable had he committed the act himself.

In either case, if the scope of judicial immunity allows judges to authorize the use of excessive force to hail counsel before courts, as Waco alleged, then the test for judicial immunity is gravely flawed. Under the Court's decision, the strong medicines of judicial immunity and summary reversal become a bitter pill. As Justice Stewart stated, "A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."[137] Often, Americans perceive that there is

> "an aura of deism which surrounds the bench . . . [,] essential to the maintenance of respect for the judicial institution." Though the rhetoric may be overblown, I do not quarrel with it. But if the aura there be, it is hardly protected by exonerating from liability such lawless conduct as [allegedly] took place here. And, if intimidation would serve to deter its recurrence, that would surely be in the public interest.[138]

Linwood I. Rogers

137. Stump v. Sparkman, 435 U.S. 349, 367 (1978) (Stewart, J., dissenting) (footnote omitted).

138. *Id.* at 369 (quoting the brief of the petitioner Judge Stump).