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THE PROBLEM OF "THE JUDGE WHO MAKES THE CASE HIS OWN": NOTIONS OF JUDICIAL IMMUNITY AND JUDICIAL LIABILITY IN ANCIENT ROME

*Marie Adornetto Monahan**

Judicial misconduct has increasingly become the subject of public and legal scrutiny. The American Bar Association has promulgated rules that restrict judges' personal and professional conduct.¹ Presumably, judges' personal and professional lives are inseverable because judges are neutral public servants. Society entrusts judges with the duty of providing an outcome based on fair and impartial evaluation of a given dilemma. If the outcome is unfair and partial, society expects the legal and political systems to provide a remedy. Judges, however, generally are not subject to civil liability for acts of misconduct because the doctrine of judicial immunity protects them.

In American jurisprudence, the doctrine of judicial immunity is very inclusive; therefore, any actual instance of civil liability for a judge is rare. Our society, however, has a very broad based system of judicial accountability for acts of misconduct, including appeal, criminal prosecution, and various kinds of discipline. Because these sanctions intend to correct the system rather than compensate individual loss, society views judicial misconduct primarily as an offense against the public and the legal system, rather than an offense against any individual member of society.

Ancient Roman culture experienced a remarkably similar phenomenon. In ancient Rome, the public held judges accountable under very limited circumstances, similar to the limited accountability of judges under the American doctrine of judicial immunity today. Initially, Roman judges were liable only for intentional conduct, such as bribery, that received a punishment of death. Eventually, the basis for judicial liability extended to unintentional conduct, such as negligence, which coincided with a less severe punishment—a fine as opposed to the death penalty. Concurrent with this growth of a more broad-based accountability for

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1. See generally MODEL RULES OF PROFESSIONAL CONDUCT (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

judicial misconduct was the development of an appeals system in Roman law.

This Article proposes that although the basis for judicial liability in Roman culture broadened to allow an aggrieved litigant to redress a wrong, the corresponding sanctions diminished in severity in an effort to define judicial misconduct as an offense to society rather than a personal wrong deserving of violent retribution. First, this Article discusses the American doctrine of judicial immunity and the legal system's response to the problem of judicial misconduct today. Then, this Article examines the basis of the American doctrine: the Roman approach to judicial misconduct, and the corresponding sanctions through the Republican, Classical, and post-Classical Periods.

I. LIABILITY FOR JUDICIAL MISCONDUCT IN OUR LEGAL SYSTEM

A. *Development of the Doctrine of Judicial Immunity*

The doctrine of American judicial immunity has its immediate roots in English common law.² Relevant to the origins of the doctrine in Roman law, the doctrine of judicial immunity developed in English law in historical and political symmetry with the development of an appeal system. Before an established system of appeal, litigants were limited to attacking the judgment as false and seeking a fine or amercement against the judge in question.³ Once the appellate process granted litigants a means of recourse, it was no longer procedurally necessary to seek relief from erroneous or unfounded judgments by attacking the source of those decisions: the judge. In a seminal decision during the development of the English doctrine, Lord Coke articulated one of the policy reasons underlying judicial immunity as the need for finality of judgments, an "end of causes."⁴ Significantly, the historical development of an appeals system parallels the concept of judicial immunity as it expanded in both the American legal system and in Roman law.

2. For a thorough history of judicial immunity in our legal system and its origins in English law, see J. Randolph Block, *Stump v. Starkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 881-96 (1980). See generally Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 201 (1980); Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1 (1990).

3. See Shaman, *supra* note 2, at 3.

4. *Floyd v. Barker*, 77 Eng. Rep. 1305, 1306 (K.B. 1907); see also Block, *supra* note 2, at 885-87; Shaman, *supra* note 2, at 3; Michael Robert King, Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549, 551-52 (1978).

In 1871, the United States Supreme Court decided *Bradley v. Fisher*,⁵ defining judicial immunity as it exists in the United States today. Under this doctrine, judges are immune from civil liability for judicial acts performed within the jurisdiction of the court, no matter how erroneous the act or how harmful its consequences.⁶ This immunity applies to state and federal judges of all levels,⁷ whether of general or specific jurisdiction.⁸

In addition to the need for finality of judgments, a primary purpose of the doctrine in the American legal system is to protect judicial independence.⁹ Underlying this policy is the assumption that in order for judges to be truly impartial, they must be free to exercise their authority without fear of personal consequences.¹⁰ In keeping with this policy, judges remain immune from civil liability for judicial acts regardless of their motive in performing such acts.¹¹ If the law held judges liable upon a requisite showing of intent, disappointed parties could force judges into court merely by alleging partiality, malice, or corruption, and thereby defeat the goal of judicial independence.¹² Thus, to ensure judicial independence, the doctrine must protect even the occasional corrupt judge.

Because the doctrine ensures that judges will decide cases impartially, rather than out of fear of being sued, it benefits society as a whole.

5. 80 U.S. (13 Wall.) 335 (1871). The Supreme Court first addressed the issue of judicial immunity in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 537 (1868), where the Court suggested that judges might be liable for judicial acts performed both maliciously or corruptly and in excess of jurisdiction. In *Bradley*, however, the Court clearly rejected this notion. See *Bradley*, 80 U.S. (13 Wall.) at 350-51.

6. See *Bradley*, 80 U.S. (13 Wall.) at 347; see also *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978).

7. See *Ammons v. Baldwin*, 705 F.2d 1445, 1447 (5th Cir. 1983); *Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982); *Turner v. Raynes*, 611 F.2d 92, 94-97 (5th Cir. 1980).

8. See *Turner*, 611 F.2d at 97. When the Supreme Court first adopted the doctrine of judicial immunity, it distinguished between courts of general and limited jurisdiction. See *Randall*, 74 U.S. (7 Wall.) at 535-36. For an explanation of the abolishment of this distinction, see Block, *supra* note 2, at 892-96.

9. See *Forrester v. White*, 484 U.S. 219, 226-27 (1988); *Bradley*, 80 U.S. (13 Wall.) at 347; *Randall*, 74 U.S. (7 Wall.) at 536. Some courts offer the need for finality of judgments as another policy reason justifying the doctrine of judicial immunity. See *Pierson v. Ray*, 386 U.S. 547, 564 & n.4 (1967) (Douglas, J., dissenting); *Holloway v. Walker*, 765 F.2d 517, 522 (5th Cir. 1985); *Harper v. Merckle*, 638 F.2d 848, 856 & n.10 (5th Cir. 1981); see also Shaman, *supra* note 2, at 4.

10. See *Pierson*, 386 U.S. at 564 & n.4; *Holloway*, 765 F.2d at 522; *Harper*, 638 F.2d at 856 & n.10.

11. See *Forrester*, 484 U.S. at 228; *Stump*, 435 U.S. at 355-56; *Bradley*, 80 U.S. (13 Wall.) at 347.

12. See *Bradley*, 80 U.S. (13 Wall.) at 349; *Holloway*, 765 F.2d at 522; *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 370 (9th Cir. 1981).

Commentators often criticize judicial immunity as a doctrine imposed by the judiciary for its own benefit to hide negligence and intentional misconduct.¹³ Judicial immunity, however, is not for the protection of judges, but for the protection of the public, which has a strong interest in an independent judiciary.¹⁴ Although individually wronged litigants cannot collect damages for a judge's wrongful conduct, an alternative remedy through the appeal system protects them.¹⁵ Similarly, the impeachment process, the criminal system, and disciplinary proceedings protect the public from corrupt or inept judges.¹⁶

Under the doctrine as it exists today, two delimited requirements determine whether judges may incur civil liability.¹⁷ First, judges may be subject to civil liability when they perform a non-judicial act.¹⁸ Second, judges may be subject to civil liability for any act performed in complete absence of jurisdiction.¹⁹

To decide whether an act is judicial, courts look to "the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity."²⁰ In making this determination, courts have relied on a number of factors, including whether "the events involved occurred in the judge's chambers [and whether] the controversy centered around a case then pending before the judge."²¹ As one scholar has noted, in ascertaining whether conduct constitutes a judicial act, courts generally construe the facts broadly in favor of immunity,²² and in fact,

13. See Shaman, *supra* note 2, at 4.

14. See *Pierson*, 386 U.S. at 554; *Bradley*, 80 U.S. (13 Wall.) at 349; *Randall*, 74 U.S. (7 Wall.) at 536.

15. See *Forrester*, 484 U.S. at 227; *Holloway*, 765 F.2d at 522.

16. See *Forrester*, 484 U.S. at 227; *Holloway*, 765 F.2d at 522.

17. See *Stump v. Sparkman*, 435 U.S. 349, 356-57, 360 (1978).

18. See *id.* at 355-57; see also *Bradley*, 80 U.S. (13 Wall.) at 347.

19. See *Stump*, 435 U.S. at 356-57.

20. *Id.* at 362.

21. *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). This case introduced a four-part test to determine whether:

(1) the precise act complained of, use of the contempt power, is a normal judicial function; (2) the events involved occurred in the judge's 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 official capacity.

Id. The Ninth and Eleventh Circuits have since used this test as well. See *Ashelman v. Pope*, 793 F.2d 1072, 1075-76 (9th Cir. 1986); *Dykes v. Hosemann*, 776 F.2d 942, 946 (11th Cir. 1985); *Adams v. McIlhany*, 764 F.2d 294, 297 (5th Cir. 1985); *Brewer v. Blackwell*, 692 F.2d 387, 396-97 (5th Cir. 1982).

22. See *Ashelman*, 793 F.2d at 1076; *Adams*, 764 F.2d at 297; Shaman, *supra* note 2, at 9.

courts have found immunity to exist even where one or more of these factors is not present.²³

Despite the tests formulated by the courts, authorities agree that it is still somewhat unclear what constitutes a judicial act.²⁴ Although no precise definition of a judicial act exists, clearly the immunity attaches to the act itself, not the person performing the act.²⁵ Thus, an act is not judicial merely because a judge performs it.

Legal scholars and jurists have characterized non-judicial conduct as 1) conduct not requiring judicial discretion, or 2) highly aberrational behavior.²⁶ Conduct which commentators consider non-judicial because it does not require an exercise of judicial discretion or a determination of parties' rights includes ministerial, administrative, and legislative acts.²⁷ As one court noted, a judge does not "utilize his education, training, and experience in the law" to perform such acts.²⁸ Typically, a layperson could perform these non-judicial acts.²⁹ Because these acts do not involve any exercise of judicial discretion, the goal of judicial independence does not require that the law extend absolute immunity to them.³⁰ Additionally, unlike traditional judicial acts, no alternative means of review exists for such non-judicial acts.³¹ Thus, the law would provide no remedy for a party wronged by a judge's administrative, ministerial, or legislative acts if judges were immune from liability for such acts.

Courts have also characterized acts as non-judicial when judges have engaged in "highly aberrational" behavior, such as performing arrests

23. See *Harris v. Deveaux*, 780 F.2d 911, 915 (11th Cir. 1986); *Holloway v. Walker*, 765 F.2d 517, 524 (5th Cir. 1985); *Adams*, 764 F.2d at 297; *Shaman*, *supra* note 2, at 9.

24. See *Block*, *supra* note 2, at 916-21; *Shaman*, *supra* note 2, at 8; Joseph Romagnoli, Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 *FORDHAM L. REV.* 1503, 1504 (1985).

25. See *Shaman*, *supra* note 2, at 8; see also *Forrester v. White*, 484 U.S. 219, 228-29 (1988).

26. See *Shaman*, *supra* note 2, at 9.

27. See *Forrester*, 484 U.S. at 228-30 (noting that hiring and supervising court personnel is an administrative duty not entitled to the protection of judicial immunity); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980) (recognizing that promulgating attorney disciplinary rules is a legislative rather than a judicial act); *Ex Parte Virginia*, 100 U.S. 339, 348 (1879) (concluding that jury selection is a ministerial act); see also Romagnoli, *supra* note 24, at 1508. For a discussion of the distinctions between ministerial, administrative, and judicial acts, see ABIMBOLA A. OLOWOFOYER, *SUING JUDGES: A STUDY OF JUDICIAL IMMUNITY* 34-38 (1993).

28. *McMillan v. Svetanoff*, 793 F.2d 149, 155 (7th Cir. 1986).

29. See *Forrester*, 484 U.S. at 229; *Ex Parte Virginia*, 100 U.S. at 348.

30. See *McMillan*, 793 F.2d at 155.

31. See *id.*

and summary trials.³² Other examples include intentionally misleading police officers as to the identity of a person named on an arrest warrant,³³ physically evicting a person from the courtroom,³⁴ and making derogatory comments about a defendant to the press and city officials.³⁵

Finally, the judge's motive does not factor into determining whether an act is judicial.³⁶ Even a prior agreement defining the outcome of a case, whether made out of malice or partiality, or pursuant to a bribe, will not transform a judicial act into a non-judicial one.³⁷ The judicial act analysis focuses on the judge's ultimate act, such as rendering judgment in the case, rather than on any underlying motive, such as bribery.³⁸

In addition to the judicial act requirement, the doctrine of judicial immunity has a jurisdictional component. The courts generally agree that if a judge does not lack subject matter jurisdiction completely, he is judicially immune.³⁹ There is also a distinction between acts performed in

32. See *Shaman*, *supra* note 2, at 9-10; see also *Brewer v. Blackwell*, 692 F.2d 387, 396-98 (5th Cir. 1982) (finding that a justice of the peace's alleged arrest of four men at a garbage dump, who then engaged in an automobile chase with one of the men and conducted a summary trial was not a judicial act); *Harper v. Merckle*, 638 F.2d 848, 859 (5th Cir. 1981) (concluding that a judge's jailing of a man for contempt when he entered the judge's chambers to make an alimony payment to a court employee was not a judicial act); *Lopez v. Vanderwater*, 620 F.2d 1229, 1235 (7th Cir. 1980) (determining that a judge's prosecutorial conduct in determining the charges against an arrested man was not a judicial act); *Zarcone v. Perry*, 572 F.2d 52, 53 (2d Cir. 1978) (describing how a traffic judge had a coffee vendor brought to his chambers handcuffed, and then interrogated and harassed the vendor about coffee the judge considered "putrid"); *Krueger v. Miller*, 489 F. Supp. 321, 329 (E.D. Tenn. 1977) (holding that a justice of the peace acted outside the limits of his lawful authority when he displayed a false badge and arrested a woman).

33. See *King v. Love*, 766 F.2d 962, 968 (6th Cir. 1985).

34. See *Gregory v. Thompson*, 500 F.2d 59, 64 (9th Cir. 1974).

35. See *Harris v. Harvey*, 605 F.2d 330, 336 (7th Cir. 1979).

36. See *King*, 766 F.2d at 968 (finding that judge deliberately misled police into believing the man named on an arrest warrant was a man who had filed a complaint against the judge); *Harris*, 605 F.2d at 333-36 (reporting that judge made repeated derogatory and racially-based comments about police lieutenant to the press and city officials).

37. See *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (holding that a conspiracy does not pierce judicial immunity); *Dykes v. Hosemann*, 776 F.2d 942, 946 (11th Cir. 1985) (concluding that judges who conspire are immune if performing a judicial act); *Holloway v. Walker*, 765 F.2d 517, 523 (5th Cir. 1985) (finding complaint alleging that harm was inflicted by judicial acts to which absolute immunity would apply, although caused by bribe or conspiracy, was insufficient to avoid judicial immunity); *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 980-81 (5th Cir. 1979) (determining that the advantages of punishing those who subvert the judiciary outweigh any good conferred by a derivative judicial immunity rule).

38. See *Ashelman*, 793 F.2d at 1077-78.

39. See *id.* at 1076; *Dykes*, 776 F.2d at 948; *Green v. Maraio*, 722 F.2d 1013, 1017 (2d Cir. 1983). But see *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980) (holding that acts taken in the absence of personal jurisdiction are not protected by judicial immunity).

excess of jurisdiction and those performed in complete absence of jurisdiction. Judicial immunity protects the former, but not the latter acts.⁴⁰ In *Bradley v. Fisher*,⁴¹ the Court gave a helpful example to distinguish the two: a probate judge presiding over a criminal prosecution acts in complete absence of jurisdiction; however, a criminal court judge who convicts a person for a non-existent offense merely acts in excess of jurisdiction.⁴²

In *Bradley*, the Court stated that a judge is not immune from civil liability when no subject matter jurisdiction exists and the judge is aware of its absence.⁴³ Subsequently, some courts have held that a judge can only act in complete absence of jurisdiction when he is aware that he lacks jurisdiction or when he acts in the face of a clearly valid statute or case law that deprives him of jurisdiction.⁴⁴ Other courts, however, have held that a judge's imputed knowledge plays no role in determining whether the judge acted in complete absence of jurisdiction.⁴⁵

Some of the most difficult questions a judge must consider relate to his jurisdiction; therefore, courts broadly construe jurisdiction to achieve the purposes of judicial immunity.⁴⁶ Even grave procedural errors will not deprive a judge of full jurisdiction for judicial immunity purposes.⁴⁷ In

40. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351-52 (1872); see also *Stump v. Sparkman*, 435 U.S. 349, 356 n.6 (1978) (quoting *Bradley*, 80 U.S. (13 Wall.) at 351-52).

41. 80 U.S. (13 Wall.) 335 (1872).

42. See *id.* at 352.

43. See *id.*

44. See *Rankin*, 633 F.2d at 849; *Turner v. Raynes*, 611 F.2d 92, 95 (5th Cir. 1980). In *Turner*, the Fifth Circuit stated that one possible interpretation of *Stump* is that a judge is only liable if he exercised unconferrred jurisdiction in such a crass manner as to indicate he did so either knowingly or recklessly. See *Turner*, 611 F.2d at 95. In the same year, the Ninth Circuit, in *Rankin*, clearly stated a judge was immune unless he was aware he lacked jurisdiction, or he acted in the face of a clearly valid law depriving him of it. See *Rankin*, 633 F.2d at 849. The Sixth and Eleventh Circuits also adopted this position. See *Mills v. Killebrew*, 765 F.2d 69, 71 (6th Cir. 1985); *Dykes v. Hosemann*, 743 F.2d 1488, 1497 (11th Cir. 1984).

45. See *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 370 (9th Cir. 1981). In *O'Neil*, the Ninth Circuit contradicted its holding in *Rankin* by holding that a judge's intent does not factor into the jurisdictional analysis. See *id.* The court reasoned that the *Stump* court neither stated nor implied that a judge's knowledge of his jurisdiction affected his immunity. See *id.*

46. See *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986).

47. See *Stump v. Sparkman*, 435 U.S. 349, 359 (1978); *Bradley*, 80 U.S. (13 Wall.) at 357; *King v. Myers*, 973 F.2d 354, 359 (4th Cir. 1992) (describing how judge ordered warrantless arrest); *King v. Love*, 766 F.2d 962, 965 (6th Cir. 1985) (explaining that judge jailed party for contempt when he was only authorized to impose fine); *Lopez v. Vanderwater*, 620 F.2d 1229, 1234 (7th Cir. 1980) (noting that judge conducted a trial in a police station that fell outside his jurisdiction); *King v. Thornburg*, 762 F. Supp. 336, 338 (S.D. Ga. 1991) (discussing how magistrate ordered the arrest of an attorney who failed to ap-

fact, a judge of general jurisdiction has jurisdiction over any matter unless the law specifically denies jurisdiction.⁴⁸ Given this broad construction of the jurisdictional requirement, lack of jurisdiction rarely breaches judicial immunity.⁴⁹

B. Methods of Ensuring Judicial Accountability

Although judicial immunity is an absolute bar to recovering monetary damages against judges, the legal and political systems make judges accountable through other methods. First, judges are not immune from awards of injunctive relief.⁵⁰ Because judges need not fear the personal consequences of an injunction, such immunity is not necessary to protect judicial independence.⁵¹ Further, the Supreme Court has ruled that parties may hold judges liable for attorneys' fees under the Civil Rights Attorney's Fees Awards Act.⁵² While such liability seems to threaten judicial independence, the Court found that Congress specifically intended to impose such liability upon the judiciary.⁵³ As the Court noted, it is within Congress' authority and discretion to abrogate the common law doctrine.⁵⁴

Although judges are generally not subject to civil liability, they are subject to criminal liability. Judges remain criminally liable for fraud, conspiracy, or any other crimes, even when they commit those crimes in

pear in court); *Ross v. Arnold*, 575 F. Supp. 1494, 1495 (E.D. Wis. 1983) (detailing how judge in a divorce proceeding ordered the husband to vacate the couple's residence, and upon the husband's refusal to vacate, ordered him incarcerated).

48. *See Stump*, 435 U.S. at 358.

49. *But see Maestri v. Jutkofsky*, 860 F.2d 50, 53 (2d Cir. 1988) (denying judicial immunity when town judge issued an arrest warrant for persons who committed offenses outside his territorial jurisdiction); *Hoppe v. Klapperich*, 28 N.W.2d 780, 789 (Minn. 1947) (explaining that judge acted wholly without jurisdiction by issuing an arrest warrant when no written complaint had been made); *State ex rel. Little v. United States Fidelity & Guar. Co.*, 64 So. 2d 697, 702-03 (Miss. 1953) (finding judge liable where he knowingly drafted an affidavit to state that an offense occurred within his jurisdiction when it clearly had not); *Vickrey v. Dunivan*, 279 P.2d 853, 855-56 (N.M. 1955) (detailing how judge tried person for an act performed outside the judge's territorial jurisdiction and which was not even an offense); *Utley v. City of Independence*, 402 P.2d 91, 94 (Or. 1965) (describing how judge completely lacked jurisdiction when he issued an arrest warrant without a written complaint).

50. *See Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984).

51. *See id.* at 536-38. The Court noted that judges have never been held absolutely immune from injunctive relief and that there is no evidence that this policy has chilled judicial independence. *See id.* at 536. Furthermore, the stringent requirements for obtaining equitable relief minimize the risk that judges will be harassed and judicial independence compromised. *See id.* at 537-38.

52. *See id.* at 543-44.

53. *See id.* at 543.

54. *See id.*

connection with the judicial office.⁵⁵ The courts have found that providing judges with immunity from criminal liability would pose too great a risk to the public interest in law enforcement.⁵⁶ The limited exception to this rule is that the law will not hold judges criminally liable for erroneous judicial acts performed in good faith.⁵⁷

In addition to liability for their criminal behavior, society can hold judges accountable for their misconduct through several other methods. These methods include impeachment or removal from office and sanctions imposed by organizations that regulate judicial conduct. For example, Article II, Section IV of the United States Constitution provides for removal of federal judges upon impeachment and conviction for bribery, treason, or other high crimes and misdemeanors.⁵⁸ Most state constitutions have similar provisions for legislative impeachment of state judges.⁵⁹

Some states provide additional methods of removing judges from office, although such methods are infrequently used.⁶⁰ One procedure, "Address to the Executive," occurs where both houses of the state legislative body formally request that the governor remove a judge from office.⁶¹ A few states also provide for removal of judges by recall election.⁶² Under this procedure, only a designated number of voters' signatures will secure that the recall proposition is put on the ballot.⁶³ The general voting population then determines whether to remove the judge from office.⁶⁴ Finally, most states now have at least some elected judges, allowing the public to "remove" judges by choosing not to re-elect them.⁶⁵

Commentators have criticized the above methods of impeachment and

55. See *United States v. Chaplin*, 54 F. Supp 926, 930, 933 (S.D. Cal. 1944).

56. See *id.* at 934 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226-27 (1821)).

57. See *Braatelen v. United States*, 147 F.2d 888, 895 (8th Cir. 1945).

58. "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4. It has never been disputed that judges are civil officers for purposes of impeachment. See Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 773 (1989).

59. See Russell R. Wheeler & A. Leo Levin, *Judicial Discipline and Removal in the United States* (July 1979) (paper prepared for the Fed. Jud. Ctr.), available in 1979 WL 24794.

60. For a general discussion of these methods, see Wheeler & Levin, *supra* note 59, and Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1 (1977).

61. See Schoenbaum, *supra* note 60, at 4.

62. See Wheeler & Levin, *supra* note 59, at 4-5.

63. See Schoenbaum, *supra* note 60, at 8.

64. See *id.*

65. See Wheeler & Levin, *supra* note 59, at 5.

removal,⁶⁶ labeling them cumbersome, time-consuming, and politically motivated.⁶⁷ Additionally, the methods provide only for the extreme penalty of removal from office, which is inappropriate in many cases.⁶⁸ If the judge remains in office, he or she remains unpunished. Consequently, state lawmakers rarely use these methods of judicial removal, which contributes to their ineffectiveness.⁶⁹

Recently, states have addressed the problem of judicial discipline by adopting codes of judicial conduct and creating judicial conduct organizations to enforce them. The *Model Code of Judicial Conduct*, promulgated by the American Bar Association, has been adopted in full or in part by forty seven states, the District of Columbia, and the Federal Judicial Conference.⁷⁰ Thus, virtually all state and federal judges are subject to the *Code*,⁷¹ which provides that judges must uphold the integrity and independence of the judiciary,⁷² avoid impropriety and the appearance of impropriety,⁷³ and perform their duties impartially and diligently.⁷⁴

Finally, all fifty states and the District of Columbia have established judicial conduct organizations to investigate and adjudicate complaints of judicial misconduct.⁷⁵ These organizations can compel sanctions or recommend sanctions to a higher body that imposes them.⁷⁶ Possible

66. For an evaluation of several of the impeachment and removal methods discussed, see generally Wheeler & Levin, *supra* note 59, and Schoenbaum, *supra* note 60.

67. See Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 10 (1988).

68. See *id.*

69. See *id.*

70. See *id.* at 3; see also Yvette Begue & Candice Goldstein, *How Judges Get Into Trouble: What They Need to Know About Development in the Law of Judicial Discipline*, 26 JUDGES J. 8, 9 (1987). Montana, Rhode Island, and Wisconsin have not adopted the Model Code. See *id.* The ABA revised the Code in 1990, and since that time, nearly 20 jurisdictions have adopted new codes of judicial conduct modeled on the 1990 revision. See STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS*, 573-75 (2000).

71. See Shaman, *supra* note 67, at 3.

72. See Begue & Goldstein, *supra* note 70, at 9.

73. See *id.*

74. See *id.*

75. See Shaman, *supra* note 67, at 11.

76. See *id.*

sanctions include censure,⁷⁷ suspension,⁷⁸ and removal from office.⁷⁹ In the federal system, a judicial council in each circuit imposes sanctions for judicial misbehavior.⁸⁰ Unlike the state judicial conduct organizations, these councils do not enjoy the power of removal, although they can recommend the initiation of impeachment proceedings.⁸¹ Other sanctions the council can enforce include recommendations to retire, suspending caseloads, and censuring judges privately and publicly.⁸² Commentators consider sanctions the most effective method of disciplining judicial misconduct.⁸³

Society, therefore, holds judges accountable to the public in a number of ways. The legal system is designed to correct itself either through a system of appeals or through the few limited circumstances when litigants can hold a judge liable for his or her conduct through criminal prosecution or disciplinary proceedings. Elected judges are also subject to the political system, where opponents may expose judicial conduct in an effort to prevent his or her re-election. These accountability measures ensure that the legal system supports both individual and societal reliance on the judicial process. Therefore, while the doctrine of judicial

77. See generally *In re Inquiry Concerning a Judge*, 788 P.2d 716 (Alaska 1990) (privately reprimanding a judge for creating appearance of impropriety by self-validating reduced airline tickets); *Quinn v. State Comm'n on Judicial Conduct*, 430 N.E.2d 879 (N.Y. 1981) (censuring a judge in connection with convictions for public intoxication); *In re Roth*, 645 P.2d 1064 (Or. 1982) (censuring a judge in connection with conduct constituting criminal mischief); *In re Larsen*, 616 A.2d 529 (Pa. 1992) (publicly reprimanding an associate judge for ex parte communications).

78. See generally *In re Schenck*, 870 P.2d 185 (Or. 1994) (suspending judge from office for ex parte communications, failure to disqualify himself, and publishing comments on pending cases); *West Virginia Judicial Inquiry Comm'n v. Dostert*, 271 S.E.2d 427 (W. Va. 1980) (censuring and suspending judge for assisting officers with arrests and carrying a weapon without proper license).

79. See generally *In re Peck*, 867 P.2d 853 (Ariz. 1994) (removing justice of the peace for ex parte communications and failure to disqualify himself); *In re Callanan*, 355 N.W.2d 69 (Mich. 1984) (removing judge from office in connection with convictions for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), aiding and abetting RICO violations and aiding and abetting mail fraud); *In re Duncan*, 541 S.W.2d 564 (Mo. 1976) (removing judge from office for breaking and entering); *In re Coruzzi*, 472 A.2d 546 (N.J. 1984) (removing judge from office after conviction for four counts of bribery).

80. See Shaman, *supra* note 67, at 16. These councils are authorized by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035.

81. See Shaman, *supra* note 67, at 16-17. Some question exists as to whether impeachment of judges, as provided in the Constitution, is the only constitutional method of removing judges from office. See *id.* at 17.

82. See 28 U.S.C. § 372(c)(6)(B) (1994); Shaman, *supra* note 67, at 17.

83. See generally Schoenbaum, *supra* note 60, at 1-2; Shaman, *supra* note 67, at 11.

immunity greatly protects judges from civil liability, limited practices of judicial accountability help to preserve the integrity and workability of our legal system.

II. JUDICIAL LIABILITY IN ROMAN LAW

In ancient Rome, the concept of judicial liability developed as one means of self-correction within the judicial process. Judges enjoyed a kind of immunity from acts of misconduct arising out of their official duties in an effort to protect the independence of the judiciary. Roman law, however, held judges liable for dishonest and wrongful conduct relative to their resolution of cases brought before them. Over time, a system of self-correction for judicial misconduct developed within the Roman judiciary.

In the Roman legal system, parties established liability based upon fault in a cause of action called the *delict*, which means "wrong." Generally, actions that arose *ex delicto* were civil as opposed to criminal wrongs and usually threatened the security of an individual's rights. Originally, a violent retribution requited a *delictal* wrong; eventually, less violent means, such as monetary recompense, satisfied requital for such a wrong. Significantly, the *delict* encompassed injury to an individual's rights as well as harm to the state, and thereby served both a civil and criminal function in society.

The ancient Romans also established tort-like judicial liability in actions that arose "as if from a *delict*" or *quasi ex delicto*. The *quasi-delicts* encompass liability for careless conduct including liability for judicial dishonesty. In Roman law, judicial liability was created by a *quasi-delict* termed the *iudex qui litem suam facit*, which translates as a judge who "make[s] a case his own."⁸⁴ This legal action has garnered substantial scholarly recognition, but only in an attempt to reconcile it with the other three *quasi-delicts*.⁸⁵ Scholars, however, have given less attention to a de-

84. J. INST. 4.5. The *Institutes of Justinian* are the source for the term *quasi-delict*. According to Justinian's compilation, a *quasi-delict* imposes liability on a defendant regardless of whether that defendant caused the harm in question. See *id.*; see also BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 224-25 (1962); J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 377-79 (1976).

85. The four *quasi-delicts* are: *iudex qui litem suam facit*; *res deiectae vel effusae*; *res suspensae*; and *nautae caupones stabularii*. See J. INST. 4.5; see also WILLIAM W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, 598-99 (1950); R.W. LEAGE, ROMAN PRIVATE LAW 421 (1961); Peter Stein, *The Nature of Quasi-delictal Obligations in Roman Law*, in 5 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITE' (1958); 8 DRAGONIR STOJCEVIC, SUR LE CHACTERE DES QUASI-DELITS EN DROIT ROMAIN 57-58 (1957).

tailed study of the legal significance of the *iudex qui litem suam facit*, which merits a close examination. This Article analyzes this action as it developed from the Republican through the post-Classical Periods in Roman law. The scope of the *iudex qui litem suam facit* and its corresponding sanctions during each period will receive particular scrutiny.

A. Republican Period: A Focus on Intentional Misconduct

During the Republican Period, beginning in approximately the fifth century B.C. and extending to about 200 A.D., Rome defined itself as a strong political entity both in Italy and abroad.⁸⁶ At this time, the Romans codified centuries-old legal customs and traditions into a formal written expression of the law known as the Twelve Tables. The Twelve Tables is the source for one of the few proceedings in the Republican Period that accomplished a limited type of judicial review.⁸⁷ Roman law invoked this proceeding against the *iudex qui litem suam facit*. The Twelve Tables states:

*Dure autem scriptum esse in istis legibus quid existimari potest? nisi duram esse legem putas, quae iudicem arbitrumve iure datum, qui ob rem dicendam pecuniam accepisse convictus est, capite poenitur . . . ?*⁸⁸

How is it possible that these laws be considered harsh? Unless you think that a law is harsh that punishes a judge or arbiter with capital punishment, if he had clearly been shown to have accepted money to influence his decision.⁸⁹

The tone of this passage implies that the Romans considered capital punishment a suitable penalty for a judge who accepted a bribe. An understanding of the Twelve Tables in their entirety clarifies the appropriateness of the sanction during the Republican Period. Many of the customs codified in the Twelve Tables reflected a primitive culture that

86. For extensive treatments of ancient Roman history, see generally 2 DONALD KAGEN, PROBLEMS IN ANCIENT HISTORY (1966), CARL ROEBUCK, THE WORLD OF ANCIENT TIMES (1966), MICHAEL CORANT, HISTORY OF ROME (Prentice Hall 1978), and DAVID JOHNSTON, ROMAN LAW IN CONTEXT (Cambridge 1999). The historical background for this Article is derived from these sources.

87. Besides the *iudex qui litem suam facit* the only proceedings in the nature of review were the *revocatio in duplum* and a *restitutio in integrum*. Neither of these proceedings addressed the wrong of judicial misbehavior. See ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 7 (1941).

88. AULUS GELLII, NOCTES ATTICAE, 20.1.7.

89. All of the English translations in this text are from the following texts, with some modification: THEODOR MOMMSEN, DIGEST OF JUSTINIAN (Paul Krueger & Alan Watson eds., Univ. of Pa. Press 1985), and EDWARD POSTE, INSTITUTES OF ROMAN LAW BY GAIUS (Oxford 1890).

often used the death penalty as a means of retributive vengeance.⁹⁰ The sanction of capital punishment against a misbehaving judge preserves this retributive purpose. As a legal penalty, it formally gave a wronged litigant the opportunity to requite an injury caused by a judge's misbehavior.

Significantly, in the Twelve Tables, the sanction focuses on the manner in which the judge acted rather than the correctness of his opinion. The text does not discuss whether the decision of the corrupt judge is legally correct.⁹¹ Rather, the passage stresses the behavior of the judge by use of the Latin phrase *ob rem dicendam accepisse convictus est*. This phrase means that the judge took money "for the purpose of making a biased opinion." The Latin makes it very clear that the judge must have acted intentionally because the grammatical function of the gerundive clause, *ob rem dicendam*, indicates the purpose behind the verbal action of accepting money. Hence, by accepting the money with the purpose of favoring one party, the judge committed an intentional wrong.⁹² Thus, the Romans limited judicial liability during the Republican Period to the intentional deviation from judicial impartiality motivated by the acceptance of a bribe.

It is significant that the scope of judicial misbehavior subject to punishment during the Republican Period was so limited. No system of appeal existed during this period, and the alternative type of judicial review available was narrow in scope.⁹³ The combination of these factors explains why a misbehaving judge endured such a severe sanction. By creating an action that harshly punished judicial misconduct, Republican Rome produced a strong deterrent against such misconduct while giving some means of recourse to litigants.

B. Classical Period: Judicial Liability Extended

The scope of judicial liability broadened during the Classical Period of Roman law.⁹⁴ A review of the sources from this period reveals that during the Classical Period, a judge was liable for intentional, and perhaps

90. See HANS JULIUS WOLFF, *ROMAN LAW*, 57-58 (1951).

91. See J.M. KELLY, *ROMAN LITIGATION* 110 (1966); see also RUDOLPH SOHM, *THE INSTITUTES, A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW* 424 (1907). See generally OTTO LENEL, *DAS EDICTUM PERPETUUM* 136 (1927).

92. See KELLY, *supra* note 91, at 108-112.

93. See SOHM, *supra* note 91, at 288-89, 300-01.

94. See WOLFF, *supra* note 90, at 103-17. The Classical Period of Roman Law extended from the coming of the Principate to around the middle of the third century B.C. See *id.* at 103.

unintentional, acts of judicial malfeasance. One of the Classical sources for the *iudex qui litem suam facit* is a passage in the *Digest* attributed to Ulpian:⁹⁵

*Iudex tunc litem suam facere intellegitur, cum dolo malo in fraudem legis sententiam dixerit (dolo malo autem videtur hoc facere, si evidens arguatur eius vel gratia vel inimicitia vel etiam sordes), ut veram aestimationem litis praestare cogatur.*⁹⁶

A judge makes the case his own when from evil intent, that is a bias due to friendship, hatred, or corruption, he gives a fraudulent judgment, and he is condemned to pay the market value of the thing in dispute.

Of central importance to this passage is the *fraudam sententiam* or the “fraudulent judgment” rendered by the judge. In the context of this passage, a fraudulent judgment is not necessarily a legally incorrect opinion. Rather, the Latin word *fraudam* implies that the opinion was in some way tainted or cheated of honest and impartial deliberation by the judge.

Ulpian further clarifies the nature of the fraudulent judgment by stating that the judge must intentionally depart from his duty to judicial impartiality. Ulpian establishes this by the phrase *dolo malo*, which means injurious “evil intent.”⁹⁷ *Dolus*, a noun that refers to the judge’s state of mind, is in the ablative case, which functions here to stress the conditions under which the fraud was committed. Thus, regardless of the legal correctness of the decision, the judge would incur liability if a deceitful or evil state of mind tainted his opinion.

To underscore the fact that the judge’s perspective or evil intent is the gravamen of the offense, Ulpian lists particular circumstances that may have motivated the fraud: friendship (*gratia*), hatred (*inimicitia*), and corruption (*sordes*). For example, the judge’s impropriety may have involved an affirmative action, such as the taking of a bribe. Under such circumstance, the presumption of *dolus* on the part of the judge would be great.⁹⁸ Alternatively, the judge’s behavior could involve a less obvious wrong, such as a narrow or harsh decision in a case due to a personal bias.⁹⁹ Because Ulpian establishes *dolus malus* as the source of fault for the *iudex qui litem suam facit*, a number of different circumstances in-

95. See H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 398-99 (1932). Ulpian’s works are dated around the third century B.C. See *id.*

96. DIG. 1.15.1 (Ulpian, Edict 21).

97. See A.M. HONORE, GAIUS 103 (1962).

98. For a full discussion of *dolus* type situations, see the chapter on *The Misbehaving Judge* in KELLY, *supra* note 91, at 102-17.

99. See *id.*

volving intentional judicial partiality may give rise to judicial liability. Consequently, the Classical Period witnessed a broader scope of judicial liability than the Republican Period, which limited the scope to intentional fraud, such as accepting a bribe of money.

Another passage of Ulpian speaks of the need for judicial liability due to the possibility of unfairness or unskillfulness of a judge.¹⁰⁰ Still, Ulpian does not mention the necessity of *dolus*. This passage reveals that one should not read the foregoing passage of Ulpian as a definitional limitation upon the *iudex qui litem suam facit* as it was known during his lifetime. Rather the inconsistencies between the two passages evidence a transitional state of the law of judicial liability during the Classical Period.¹⁰¹

A passage in the *Digest*, attributed to Gaius, illustrates this fluctuation in the state of the law:

*Debet autem iudex attendere, ut cum certae pecuniae condemnatio posita sit, neque maioris neque minoris summa posita condemnet, alioquin litem suam facit; item si taxatio posita sit, ne pluris condemnet quam taxatum sit; alias enim similiter litem suam facit. Minoris autem damnare ei permissum est.*¹⁰²

When a certain sum is laid in the *condemnatio*, a judge must be careful not to condemn the defendant in a greater or lesser sum, else he makes himself liable to damages: and if there is a limitation he must be careful not to exceed the maximum, else he is similarly liable.

If a judge improperly set damages, the judge assumed liability for damages, which would be determined in accordance with the judge's degree of fault.¹⁰³ Curiously, Gaius makes no mention of intent in this passage. Such silence as to the judge's state of mind would allow liability to attach whether the judge acted with *dolus* or mere negligence in the performance of his duty.

Another passage attributed to Gaius, further defines the scope of the *iudex qui litem suam facit*. It reads:

Si iudex litem suam fecerit, non proprie ex maleficio obligatus videtur. Sed quia neque ex contractu obligatus est, et utique peccasse aliquid intellegitur licet per imprudentiam: ideo videtur quasi ex maleficio teneri in factum actione, et in quantum de ea re

100. See DIG. 49.1.1. (Ulpian, Appeals 1).

101. See KELLY, *supra* note 91, at 111-13.

102. G. INST. 4.52; see POSTE, *supra* note 89, at 501-02.

103. See POSTE, *supra* note 89, at 510.

*aequum religioni iudicantis visum fuerit poenam sustinebit.*¹⁰⁴

If a judge make a case his own, the obligation he incurs is not created by *delict*, nor yet by contract, but as he commits a fault, though it may be without intention, he is liable in an action *in factum* for a *quasi-delict* to such damages as may be assessed.

The difficulty presented is that Gaius extends judicial liability to acts that occurred unintentionally (*per imprudentiam*). Because Ulpian and Gaius were contemporaries, it is unlikely that the former would limit judicial liability to intentional acts, while the latter would extend such liability to negligence. To reconcile this inconsistency, scholars have regarded the portion of Gaius' passage from "the obligation" to "*quasi-delict*" as an interpolation, or an insertion of text from an outside source.¹⁰⁵ Such reasoning is persuasive not only from a linguistic perspective, but also from an historical one.¹⁰⁶

One scholar regards the interpolation itself as evidence of the transitional state of the law during the Classical Period.¹⁰⁷ Nevertheless, even if one disregards the interpolated portions of the passage, Gaius still makes no specific reference to the necessity of *dolus*. The lack of such specificity leads to differing interpretations of the passage. One may read it with strict adherence to prior custom and argue that if the *quasi-delict* were to extend its liability to unintentional acts, the author would have mentioned it specifically. An alternative reading favors the trend of the law at that time and argues that because the *quasi-delict* broadened its scope over time, the vagueness of Gaius' passage intended to allow for broad interpretations including both intentional and unintentional acts.

Based on this passage of Gaius, however, the scope of judicial liability was probably the same during the lifetimes of Gaius and Ulpian because both authors of the *Digest* aimed to collect and interpret legal customs as they had developed up to the second century A.D. As the empire grew, a system of appeals began to emerge;¹⁰⁸ Gaius and Ulpian wrote during a transitional period between the Republican Period, when there were no appeals, and the later empire, when a system of appeals was fully developed. A legal system that lacked a system of review, as in the Republican Period, posited greater power in the judiciary. Correspondingly, the legal system of that period provided an alternative to a right of appeal, the *iudex qui litem suam facit*, which provided a remedy for a specific ju-

104. G. INST. 44.7.5; 50.13.6.

105. See Stein, *supra* note 85, at 569-70.

106. See KELLY, *supra* note 91, at 111-14.

107. See *id.* at 112-14.

108. See POUND, *supra* note 87, at 8; see also THOMAS, *supra* note 84, at 121 n.25.

dicial misbehavior, i.e., bribery. The death penalty sanction underscores the importance vested in this remedy during the Republican Period.

Similarly, during the Classical Period, the *iudex qui litem suam facit* existed as a remedy that served as an alternative to appeals. However, because a system of appeals began to emerge during the Classical Period, the pressure was not as great on that society to provide an alternative method of review. Thus, although the *iudex qui litem suam facit* was still a very viable action against a misbehaving judge, its symbolic value as the guardian of judicial integrity diminished. Reducing the sanction from the imposition of the death penalty to the assessment of a fine clearly illustrates this point.¹⁰⁹

C. Post-Classical Period: Focus on Unintentional Misconduct

A final source of the *iudex qui litem suam facit*, which establishes judicial liability during the post-Classical Period, appears in the *Institutes* of Justinian.¹¹⁰ The text is almost identical to that of Gaius in the *Digest* and commentators have long agreed that Justinian relied heavily upon Gaius' work.¹¹¹ It is certain, however, that by Justinian's time the scope of judicial liability extended to unintentional acts of the judge.¹¹² A close reading of the *Institutes* elucidates what types of judicial misbehavior the Romans included within the ambit of the *iudex qui litem suam facit* during the later empire.

During that period, Roman law held the judge responsible for a *maleficium* although he was viewed as not having acted strictly from *maleficium*. The word *maleficium* is very close in meaning to *delict*, that is, a wrong or an evil deed. Because the "male" part of the word means evil, *maleficium* means a deed that is evil in and of itself. In the *Institutes* of Justinian, *maleficium* refers to judicial bias.¹¹³ Justinian introduces the idea of fault by use of the verb *pecasse*, which means to do amiss, to mistake, or to transgress. Thus, during the post-Classical Period, the judge

109. For a discussion of the death penalty as an appropriate sanction, see KELLY, *supra* note 91, at 109. For the evolution of the sanction to a monetary penalty, see DIGEST OF JUSTINIAN 1.15.1, and POSTE, *supra* note 89, at 510.

110. The post-Classical Period begins with Diocletian and ends with Justinian's compilation in 529. See FRITZ SCHULTZ, HISTORY OF ROMAN LEGAL SCIENCE 262-65 (1946).

111. See WILLIAM W. BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW 341 (1931).

112. See KELLY, *supra* note 91, at 114-15; see also WILLIAM W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 330 (1925); JAMES MACKINTOSH, ROMAN LAW IN MODERN PRACTICE 169 (1934).

113. For a discussion of *maleficium*, see HONORE, *supra* note 97, at 101-04.

was liable for an error that rose to the level of a *maleficium* even though he may have committed it through ignorance or imprudence.

Clearly, the scope of judicial liability broadened during the later empire. The phrase *per imprudentiam* (unintentionally), which is definitely a part of the Justinian passage and not an interpolation as it was during the time of Gaius, imposed additional liability on a judge for a good faith procedural error such as missing the day of trial or making a minimal error in setting damages.¹¹⁴ Because the law required neither proof of harmful intent (*dolus*) nor any mention of the degree of harm to a litigant, the judge's vulnerability to suit was great. Two developments during the later empire, however, balanced this vulnerability. First, litigants had recourse to an appellate court if they felt wronged by a decision.¹¹⁵ Such a development would reduce the number of actions for personal liability against a judge. Second, the sanction imposed upon the judge was a fine in the amount of the litigation (if caused by *dolus*) or set by the judge himself (if prompted by negligence).¹¹⁶ The lack of severity of this sanction is inversely related to the broadness of the judge's liability. Therefore, while the scope of judicial liability was broadest during the post-Classical Period, the penalty for judicial misbehavior was most lenient.

III. CONCLUSION

The scope of judicial liability in Roman law covered a range of activity including intentional and unintentional judicial misbehavior. The extension of judicial liability from clearly intentional acts of wrongdoing to imprudent error created a broader base of judicial accountability. Two other changes in the law accompanied this chronological development. As the judge incurred greater liability for judicial misbehavior, the sanctions imposed upon the judge became less severe and more compensatory in nature. During the Republican Period, the scope of the *iudex qui litem suam facit* was very narrow, yet its sanction was very harsh. Hence, its legal purpose during that time was deterrence and retribution. During the Classical and post-Classical Periods, its scope broadened, while its sanction diminished. Roman law increasingly directed the sanction at compensation of the litigant in an effort to preserve the integrity of the legal system.

114. See SOHM, *supra* note 91, at 424.

115. See THOMAS, *supra* note 84, at 121; see also POSTE, *supra* note 89, at 632.

116. See POSTE, *supra* note 89, at 510; see also J.B. MOYLE, *INSTITUTES OF JUSTINIAN* 172-73 (Oxford 4th ed. 1906).

This phenomenon in Roman law parallels the development of the doctrine of judicial immunity in the American legal system, where the availability of an appeal system gave rise to the concept of judicial immunity. Currently, the status of judicial immunity is rather broad, thus providing little recourse to litigants for misconduct arising from a judge's official duties. However, similar to the philosophical and historical underpinnings of Roman society, American legal and political systems provide numerous other measures of accountability in an effort to balance the judiciary's need for independence with society's duty to redress the wronged litigant.