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I. INTRODUCTION

The issue of judicial liability in civil actions[1] for various types of wrongdoing has attracted recent interest as a result of the 1978 United States Supreme Court decision, *Stump v. Sparkman.*[2] In *Stump,* the Court held that an Indiana circuit judge who ordered the sterilization of a minor solely on the ex parte petition of her mother, without notice, hearing, or opportunity to appeal, was immune from civil suit brought by the daughter. The decision has been followed in a large number of cases,[3] but commentators

1. Explanation of the terminology of judicial liability and judicial immunity is required at the outset to minimize confusion. The customary but not exclusive usage of the terms "liability," and, more commonly "immunity," concerns the possibility of being subjected to a damage action. *See, e.g.,* Stump v. Sparkman, 435 U.S. 349, 355-56 (1978) (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871)). Of course, immunity from suit is a fiction since a rule of law cannot prevent a plaintiff from filing suit but can only provide a reduced probability of success on the merits. The issue here is the scope of the rule of liability. In tort law, an immunity is a status that renders a person not liable when another person, not possessing the status, would be liable. Basically, an immunity is a defense that permits disposition of a suit at an early stage of the proceeding. For example, under a rule of sovereign immunity, a tort action against a state may be dismissed without any further examination of the facts. This is not the case with judicial "immunity" under any version of the concept, because judicial immunity requires that the act complained of be related to the judge's official duties, although the precise relation required is variously defined by different courts. Thus, a tort claim against a judge cannot be dismissed solely on those facts; it must be determined that the judge's action was sufficiently related to his judicial duties to invoke the "immunity" rule. This further determination is guided by the liability standard. The judge may be viewed as having an immunity for acts that are within the liability standard (that is, for all "judicial acts"), but the scope of the inquiry necessary to determine whether the act complained of was "judicial" is so extensive that the term "immunity" seems misplaced. One could just as easily say that automobile drivers have an immunity for their actions when they exercise reasonable care; again, the use of the term is not helpful. Nevertheless, because of the common use of the term "judicial immunity" in both the case law and the literature, we refer to both "immunity" and "liability" throughout.

2. 435 U.S. 349 (1978).

3. *E.g.,* McClain v. Brown, 587 F.2d 389 (8th Cir. 1978); Schuman v. California, 584 F.2d 868 (9th Cir. 1978); Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978); Kelsey v. Fitzgerald, 574 F.2d 443 (8th Cir. 1978); Strawbridge v. Bednarik, 460 F. Supp. 1171 (E.D. Pa. 1978); Holland v. Rubin, 460 F. Supp. 1056 (E.D.N.Y. 1978); Adkins v. Adkins, 459 F. Supp. 406 (S.D. W.Va. 1978); Prochaska v. Fediaczko, 458 F.Supp. 778 (W.D. Pa. 1978);

unanimously have condemned the decision and have suggested reform of the rules of judicial liability and judicial immunity.[4] We agree that *Stump* was wrongly decided and that reform is needed, but we do so for different reasons and with different results.

The most frequent justification offered for judicial immunity is its alleged long-standing existence in Anglo-American common law.[5] A principal authority for this proposition is the century-old precedent of *Bradley v. Fisher,*[6] in which Justice Stephen Field stated that immunity "has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."[7] Thus, we first examine the history of judicial liability to determine if this reverence for the past is warranted. We conclude that statements such as that in *Bradley* are inadequate history at two levels, reflecting judicial misunderstanding of both what the law was and how and why it developed. Actually, English law began with a position of general judicial liability and developed only limited exceptions on grounds that are irrelevant to a discussion of judicial liability today. When the English law was received in the United States,

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Atcherson v. Siebenmann, 458 F. Supp. 526 (S.D. Iowa 1978); Rankin v. Howard, 457 F. Supp. 70 (D. Ariz. 1978); Chalk v. Elliott, 449 F. Supp. 65 (N.D. Tex. 1978).

On remand of *Stump* the Seventh Circuit held that because Judge Stump was immune and no other state action was shown, the conspiracy claim against the private defendants (Mrs. McFarlin, her attorney, the doctors who performed the sterilization, and the hospital) could not be brought on constitutional or other federal grounds. Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979).

The importance of the issue of judicial liability also is shown by the large number of suits against judges. In Pennsylvania, for example, about 150 suits were filed in 1978. Philadelphia Bulletin, Aug. 13, 1979, at 3, col. 3.

4. *See* Nagel, *Judicial Immunity and Sovereignty,* 6 HASTINGS CONST. L.Q. 237 (1978); Rosenberg, Stump v. Sparkman*: The Doctrine of Judicial Immunity,* 64 VA. L. REV. 833 (1978); Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability,* 20 ARIZ. L. REV. 549 (1978) [hereinafter cited as *A Proposal for Limited Liability*]; Note, *A Judge Can Do No Wrong: Immunity is Extended for Lack of Specific Jurisdiction* — Stump v. Sparkman, 27 DEPAUL L. REV. 1219 (1978); 22 HOW. L.J. 129 (1979); 27 KANS. L. REV. 518 (1979). Articles prior to *Stump* include Kates, *Immunity of State Judges Under the Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered,* 65 NW. U.L. REV. 615 (1970); Note, *Immunity of Federal and State Judges from Civil Suit — Time for a Qualified Immunity?,* 27 CASE W.L. REV. 727 (1977) [hereinafter cited as *Immunity of Judges*]; Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322 (1969) [hereinafter cited as *Liability of Judicial Officers*].

5. *E.g.,* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 987 (4th ed. 1971)("judges always have been accorded complete immunity for their judicial acts within the jurisdiction of courts . . . .").

6. 80 U.S. (13 Wall.) 335 (1872).

7. *Id.* at 347.

this limited immunity was expanded significantly, notably by James Kent, to limit liability, and throughout the nineteenth century a mixed pattern of judicial liability and immunity existed in America. In *Bradley,* Justice Field provided a confused reformulation of the law, which led to a further limitation of liability. At no point, however, were the advantages and disadvantages of judicial immunity fully examined.

Because the case for immunity is inconclusive and unpersuasive on historical grounds, we also examine the issue on policy grounds; our analysis proceeds from a thorough review of the case law and literature. We conclude that immunity is indefensible on policy grounds as well, but that conclusion does not convince us that any of the suggested reforms should be adopted. Instead, we draw on contemporary jurisprudential thinking to argue that no convincing policy resolution is possible. At that point, we express our own belief on the desirable response of courts to judicial liability cases, in the context of a broader conception of the past, present, and future legal order.[8]

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8. We are concerned exclusively with judicial immunity, not the immunity of other public officials, although that topic also has received considerable attention in the recent case law. Butz v. Economou, 438 U.S. 478 (1978) (except in extraordinary circumstances, federal executive officials entitled only to limited, good-faith immunity); Procunier v. Navarette, 434 U.S. 555 (1978) (state prison officials immune when unestablished constitutional right and only negligent conduct involved). *See* Nagel, *supra* note 4; *see generally* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 573-98 (1972); K. DAVIS, 3 ADMINISTRATIVE LAW TREATISE 506-44 (1958); W. PROSSER, *supra* note 5, at 987-92; Buxbaum, *Liability of Federal Officials in Damage for Acts Unconstitutional or in Excess of Their Authority: Expanding the Concept of the Rule of Law,* 8 CAP. U.L. REV. 465 (1979); Jennings, *Tort Liability of Administrative Officers,* 21 MINN. L. REV. 263 (1937).

Although they are not the primary focus of our research, we can report some impressions on the relation between the immunity of judges and the immunity of other officials. First, as our devotion to the history of judicial immunity should make obvious, the particular history of each type of immunity requires investigation. The literature of judicial immunity includes scant reference to parallel immunities of other officials, suggesting that they developed independently of each other. Second, that investigation may lead to the discovery of links between the development of the various immunities. For example, in our discussion of the immunity of the colonial and early federal magistracy, we note that magistrates performed administrative as well as judicial functions; thus two bodies of law were developing with respect to different functions of one group of officers. Third, because the administrative and judicial systems are so dissimilar, the policy determination of an appropriate rule of immunity must include different factors. The nature of the policy analysis described in Part IV of this article is applicable to both, and we suggest that the policy factors are as indeterminate and value-laden for nonjudicial as for judicial immunity. *See generally Symposium — Civil Liability of Government Officials,* 42 LAW & CONTEMP. PROB. 1 (1978).

II. JUDICIAL LIABILITY IN ENGLAND

Most of the major judicial liability cases use the common-law origins of judicial immunity as a justification for the doctrine. For example, as noted above, *Bradley v. Fisher,*[9] the case principally relied on by the Court in *Stump,*[10] used an extensive discussion of English case law to show the antiquity of the rule and to support its continued application.

In this section, we demonstrate that these conclusions about English law simply are incorrect. A careful analysis of English law shows that the basic rule was one of liability, that no simple rule of immunity ever existed, and that application to American law of those instances in which immunity was granted has been inappropriate. In sum, the English law provides little support for a rule of absolute judicial immunity.[11]

A. The Early Law

In earliest English law not only was immunity of judges not recognized, but review of judicial decisions was in the form of a personal action against the judge.[12] The consequences of a false judgment, a malicious judgment, or an action outside the judge's authority were severe for the judge and the jurisdiction he represented.[13] Not until the fourteenth century did the courts distinguish between complaints against a judgment and complaints against a judge.[14] The source of this distinction, the special status of the record of a court of record, is also one of the sources of the modern doctrine of judicial immunity. Although the present im-

9. 80 U.S. (13 Wall.) at 347-49, 353.

10. 435 U.S. at 355-56.

11. The leading articles on the English law of judicial liability are Brazier, *Judicial Immunity and the Independence of the Judiciary,* 1976 PUB. L. 397; Rubinstein, *Liability in Tort of Judicial Officers,* 15 U. TORONTO L.J. 317 (1964), and Thompson, *Judicial Immunity and the Protection of Justices,* 21 MOD. L. REV. 517 (1958). Also useful are torts treatises such as J. CLERK & W. LINDSELL, TORTS 1108-18 (14th ed. 1975), and J. SALMOND, LAW OF TORTS 416-30 (16th ed. 1973). A helpful specialized work is P. WINFIELD, THE PRESENT LAW OF ABUSE OF LEGAL PROCEDURE (1921). The commentators frequently disagree on what the law was or is, and we must therefore rely principally on original sources, except for the discussion of the earliest law in text accompanying notes 12-18 *infra.*

12. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 668 (2d ed. 1899) ("The idea of a complaint against a judgment which is not an accusation against a judge is not easily formed.").

13. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 213-15 (3d ed. 1945); 2 F. POLLOCK & F. MAITLAND, *supra* note 12, at 664-69.

14. 1 W. HOLDSWORTH, *supra* note 13, at 214.

portance of that distinction is not great, in English law generally and in the English law of judicial liability particularly,[15] the distinction was of considerable importance in shaping the law of judicial immunity.

The special status of the record of a court of record had its origin in the royal assertion that the King's word on events that had taken place in his presence was indisputable. When this privilege was extended from the King to his judges, the court of record was born and the foundation for limited judicial immunity was set. Since the record of the court was incontrovertible, no party could allege that an act noted therein was wrong, and thus the source of the record — the judge — could not be subject to civil or criminal liability for an abuse of power.

This interpretation, established by the middle of the fourteenth century,[16] had as corollaries the notions that a judge of a court not of record had no such protection and would be subject to various actions at the hands of disappointed litigants, and that the immunity of a judge of a court of record was limited to acts within his jurisdiction.[17] Acts outside his jurisdiction were unprotected by the record; in such cases, a judge was perceived to be acting as a private person and therefore he could not assert immunity based on his official position.[18] Thus, through the sixteenth century the common law provided a limited immunity for a limited group of judges on the basis of a technical proposition concerning the nature of the record of a court of record.[19]

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15. Sirros v. Moore, [1975] 1 Q.B. 118 (C.A.).

16. 5 W. HOLDSWORTH, *supra* note 13, at 157-58; 2 F. POLLOCK & F. MAITLAND, *supra* note 12, at 669.

17. 6 W. HOLDSWORTH, *supra* note 13, at 235-36.

18. *Id.*

19. *See* Gwinne v. Poole, 125 Eng. Rep. 522 (C.P. 1692); Green and the Hundred of Buccle-Churches Case, 74 Eng. Rep. 294 (C.P. 1589). *Green* was an action on the case against a justice of the peace for refusing to examine a complainant who had raised the hue and cry, resulting in a shipper being unable to recover goods stolen in a robbery. Defendant's answer was that "the justice of the peace is a Judge of Record, and for such thing as he doth as judge, no action lieth." 74 Eng. Rep. at 294. Plaintiff, recognizing the validity of this defense, could only reply that in this instance the justice was not acting as a judge of record, but rather as a minister appointed pursuant to statute for purposes of examination. If defendant had been acting within his jurisdiction as a judge of record, he would have been immune from suit despite any error in refusing to conduct the examination. The Court of Common Pleas in *Gwinne* defined more precisely the limits of the judge's immunity, stating that the judge would be liable in trespass for actions outside his jurisdiction if, at the time the cause of action arose, he was cognizant or might have been cognizant but for his own misunderstanding of the facts that rendered the action outside his jurisdiction.

B. *The Law in the Time of Coke*

The transformation of the law of judicial liability was begun by Sir Edward Coke. The seventeenth century revision of the law was based on the earlier technical distinction between courts of record and courts not of record; however, it was motivated not only by the extrapolation of that legal distinction, but also by the contemporary political struggle of larger consequence.[20] In two leading cases in this area, *Floyd v. Barker*[21] and *The Case of the Marshalsea,*[22] the bearing of the political dispute on the law of judicial liability is evident.

In *Floyd*, a judge of assize, Barker, presided at the murder trial of William Price and, upon a verdict of guilty, gave judgment and sentenced Price to death. Subsequently, Barker was charged in the Star Chamber with conspiracy. Coke held that neither Barker nor others involved in the prosecution of Price "ought to be charged with any conspiracy, in the Star Chamber, or elsewhere,"[23] and that "the said matters done at the Bar were not examinable in the Star Chamber."[24] The immunity was total: "And as a Judge shall not be drawn in question in the cases aforesaid, at the suit of the parties, no more shall he be charged in the said cases before any other Judge at the suit of the King."[25] His reasoning was related to the sanctity of a record on one hand and to broader policy considerations on the other.

The record was a potent weapon to use in the political struggle because of the unimpeachable authority of its origins, the King himself. Impugning the integrity of the record verged on impugning the integrity of the monarch.[26] Coke drew on the traditional basis for immunity, the record, and thereby provided the law courts a dual advantage over their rivals, the Star Chamber and other allies of the crown. First, no actions of a judge would be subject to examination against the record in the Star Chamber

20. In addition to the standard histories, for an especially readable account see C. BOWEN, THE LION AND THE THRONE (1957). An important recent work is S. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-28 (1979).

21. 77 Eng. Rep. 1305 (Star Chamber 1607).

22. 77 Eng. Rep. 1027 (C.P. 1610).

23. 77 Eng. Rep. at 1306.

24. *Id.* at 1307.

25. *Id.*

26. *Id.* at 1306 ("And records are of so high a nature, that for their sublimity they import verity in themselves; and none shall be received to aver anything against the record itself."). See text accompanying notes 8-11 *supra.*

or elsewhere. Furthermore, such protection would not be available to judges of the rival courts, such as the Star Chamber, which were courts not of record.[27] Thus, Coke was able to use effectively an ancient distinction based on the King's position against the King himself.

Coke's analysis of judicial liability preserved the distinctions of prior law. Judges of courts not of record still had no protection against reexamination of their acts; Coke's example was a judge of a hundred court.[28] Moreover, because judges of courts of record derived their immunity from the record, they had immunity for certain judicial acts done outside the courtroom, but lost that immunity for acts taken outside their judicial capacity.

> [I]f he hath conspired before out of Court, this is extrajudicial; but due examination of causes out of Court, and inquiring by testimony, *et similia,* is not any conspiracy, for this he ought to do; but subornation of witnesses, and false and malicious prosecutions, out of Court, to such whom he knows will be indictors, to find any guilty, &c. amounts to an unlawful conspiracy.[29]

In short, Coke's analysis was based on the particular status of a court of record and resulted in a formulation consistent with the doctrine that a judge of a court of record was immune from suit for all acts within the scope of the record, but like a judge of a court not of record, was liable for all other acts for which he could not invoke the protection of a record.

Coke introduced a new element into this area of the law by explaining on policy grounds why a judge of a court of record was entitled to immunity. One of his reasons is still today the principal policy argument advanced for judicial immunity — the potential for a multiplicity of suits, frivolous and otherwise, against judges. Coke's statement of the problem is succinct: without a rule of immunity, "there never will be an end of causes: but controversies will be infinite . . . ."[30] The difficulty with this formulation is identical to the difficulty with similar arguments in later times; any rule other than an absolute rule of immunity for all judges that gives no consideration to jurisdiction or the nature of the act committed has the potential for generating suits of great, if not "infinite," numbers.

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27. 5 W. HOLDSWORTH, *supra* note 13, at 159.
28. 77 Eng. Rep. at 1307.
29. *Id.* at 1306.
30. *Id.*

Coke's second policy argument concerned the necessity of maintaining respect for the judiciary and the government. The origins of judicial office lay in the role of the monarch as the dispenser of justice to his subjects.[31] Even though the administration of justice had become formalized by the time of Coke, the relationship between judges and King was still quite clear. For Coke, because the administration of justice "concerns the honour and conscience of the King, there is great reason that the King himself shall take account of it, and no other."[32] If the King's judges were liable to answer to others inferior to the King (including, specifically, the Star Chamber), it would tend to the "slander of the justice of the King."[33] Thus, royal judges "are only to make an account to God and the King."[34]

Coke's second major opinion on judicial immunity followed three years later in *The Case of the Marshalsea,*[35] in which he explored the limits of jurisdiction that developed out of the characterization of a court as a court of record. An act outside the jurisdiction of the court, as noted in *Floyd,*[36] was not considered to be the action of a judge and therefore was not within the record. An erroneous decision by a judge on a matter within his jurisdiction, however, was viewed as a matter of record, and therefore the judge was immune from suit for such a decision. Coke gave the example of the Court of Common Pleas holding plea in an appeal of felony and attainting the defendant as representative of an act *coram non judice,*[37] which would render the judge liable. Coke's example of an erroneous decision was a plea of debt by the common pleas court awarding a *capias* against a duke; this was illustrative of error because the law prohibits issuance of a *capias* under these circumstances.[38] The *capias,* though void, arose in a matter within the court's jurisdiction, thus shielding the judge issuing the writ from liability. Coke preserved the limitation of immunity from earlier law and his examples suggest

31. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 139-56 (5th ed. 1956).
32. 77 Eng. Rep. at 1307.
33. *Id.*
34. *Id.*
35. 77 Eng. Rep. 1027 (C.P. 1610).
36. 77 Eng. Rep. at 1306.
37. The Latin phrase translates as "not in the presence of a judge" or "without jurisdiction." The use of the Latin form of expression is evidence of the style and process of judicial reasoning. We retain that usage deliberately to better convey the sense of the process.
38. 77 Eng. Rep. at 1040.

that he also sought to preserve the qualification that a judge would be immune only if he did not and could not know of the facts limiting his jurisdiction.

Thus, the law of judicial liability at the time of Coke was clear and simple. The basic principle was liability, not immunity. A judge of a court not of record was liable for all his wrongful acts. A judge of a court of record only was liable for wrongful acts committed outside his authority. Following the seventeenth century formulation of those basic principles of judicial liability and immunity, development proceeded along the following lines: (1) further development of the distinction between abuse of jurisdiction and absence of jurisdiction and the related distinction between judicial and nonjudicial acts; (2) creation of the distinction between superior and inferior courts; and (3) creation of the distinction between malicious and nonmalicious acts. We now discuss each of these points before returning to a summary review of English law.

C. The Law After Coke

1. Abuse and Absence of Jurisdiction. — The importance of the distinction between abuse and absence of jurisdiction is apparent when one considers that judicial immunity is a defense. Once the law develops a body of tort rules that state when a person will be liable in damages for injury caused to another — and this development can be as basic as the limited generalization of the writs of trespass and case — then a judge, like any other person, will be liable for his torts unless he is able to assert an effective defense on the basis of his office. In English law, the necessary elements of that defense were that the action causing the injury was within the judge's jurisdiction, or if outside his jurisdiction, that he did not know and had no facts before him to suggest that it was outside his jurisdiction.[39] While we will discuss later[40] the analogous distinction between excess and absence of jurisdiction drawn by the Court in *Bradley v. Fisher*,[41] it is notable that the *Bradley* test is simultaneously more and less restric-

39. The elements of the defense were somewhat different for a superior court judge. See notes 57-78 and accompanying text *infra*.

40. See notes 257-60 and accompanying text *infra*.

41. 80 U.S. (13 Wall.) at 351-53 (citing Calder v. Halket, 13 Eng. Rep. 12 (P.C. 1840), and Ackerly v. Parkinson, 105 Eng. Rep. 665 (K.B. 1815)). See notes 257-59 and accompanying text *infra*.

tive of liability and harder to reconcile with its premises than the English rule.

The early common-law notion that a personal action would not lie against a judge of a court of record for an error in judgment within his jurisdiction continued to be the basic rule of immunity. Since the source of this rule was the sanctity of the record of a court of record, there was little discussion of any other basis for the rule prior to the modern period, with the exception of Coke's policy argument.[42] Further reasons are suggested in the leading case, *Hammond v. Howell,*[43] in which the court held that the nature of the judicial office required a judge to make decisions on matters properly before him, rendering it inappropriate to sanction a judge for making an incorrect, though "judicially" proper,[44] decision. This conclusion is especially valid, the court suggested, because the harm caused by the mistaken action was, as it usually is, remediable.[45]

This analysis of the nature of the judicial office and the notion of jurisdiction appears to have been the basis for modifying the rule of liability for judges of courts not of record. At some point, by a process we have not been able to identify precisely, judges of courts not of record were considered sufficiently similar to other judicial officers to be accorded a protection for judicial acts within their jurisdiction. This step in the development of the law is usually glossed over in the cases and commentary, perhaps because the answer is unclear.[46] This development must have occurred after the time of Coke,[47] but probably was settled before the series of nineteenth century cases discussed below.[48]

The converse of the principle of immunity based on the judicial act of the judge within his jurisdiction was that a judge who injured another by knowingly committing a wrongful act outside

42. See notes 30-34 and accompanying text *supra.*

43. 86 Eng. Rep. 1035 (C.P. 1677).

44. *Id.* at 1037 ("Though the defendants here acted erroneously yet the contrary opinion carried great colour with it, . . . so that they were mistaken, yet they acted judicially, and for that reason no action will be against the defendant."). Defendant judges had ordered the commitment of plaintiff, a jury member, for refusing, contrary to instructions, to convict Quakers indicted for riot.

45. The wrongful order of commitment could be corrected by the Barons in Exchequer refusing to issue process on it. *Id.* at 1036.

46. *See, e.g.,* 6 W. HOLDSWORTH, *supra* note 13, at 235-37; Thompson, *supra* note 11, at 526-28.

47. See note 28 and accompanying text *supra.*

48. See notes 53-56 and accompanying text *infra.*

his jurisdiction could not assert a defense on the basis of his office. Essentially, a judge in such a case was unable to establish the elements of the defense required by the basic rule. Yet the underlying reason for this limit to the defense was the formalistic and definitional idea that a judge acted as judge only when he exercised the functions assigned to him by law. If a judge exceeded his authority, not only was his act *coram non judice*[49] and therefore void, but it was also considered the act of a private person. The recitation of this analysis in numerous cases[50] is formulaic, but sensible; when the judge knowingly acted outside his jurisdiction, it would have been difficult for the law to be consistent in allowing him to assert his judicial status as a defense.

The intermediate case between erroneous judgment clearly within the jurisdiction of the court and knowing action in the absence of jurisdiction provided the opportunity to test the extent to which the law was being shaped by mechanical application of formal concepts and the extent to which it was being shaped by instrumental concern for the underlying objectives. When a judge exceeded his jurisdiction without actual or constructive knowledge of the facts that would indicate the absence of jurisdiction, the English courts at an early point permitted the judge to plead his lack of knowledge of jurisdictional facts as a valid defense. *Gwinne v. Poole*,[51] the earliest reported judicial immunity decision, is generally regarded as the seminal case for the doctrine *ignorantia facti excusat* — ignorance of the jurisdictional facts excuses the lack of jurisdiction.[52] Following *Gwinne,* there was a considerable gap before a series of nineteenth-century cases further articulated the principle and its effects.

In one such case, *Pike v. Carter,*[53] defendant was a justice of the peace who asserted jurisdiction over a dispute that was not within his jurisdiction due to a statutory exception. At the first hearing on the matter before the justice, one of the parties appeared as defendant but did not raise the exception; at a second hearing, none of the defendants appeared. When the defendants in the first case attempted to bring an action of trespass against

49. See note 37 *supra.*

50. *E.g.,* Moravia v. Sloper, 125 Eng. Rep. 1039 (C.P. 1737); Terry v. Huntington, 145 Eng. Rep. 557 (Ex. 1668).

51. 125 Eng. Rep. 523 (C.P. 1566). See note 19 *supra.*

52. Again, the Latin form is retained as particularly evocative.

53. 130 Eng. Rep. 443 (C.P. 1825). *See also* Calder v. Halket, 13 Eng. Rep. 12 (P.C. 1840); Lowther v. Earl of Radnor, 103 Eng. Rep. 287 (K.B. 1806).

the justice, the court held the action would not lie, Lord Chief Justice Best stating: "an action of trespass will not lie against a public officer for any thing which, in the discharge of his duty, he has been called on to do, without an opportunity having been afforded him of judging of all the circumstances under which he is to act . . . ."[54] The court's decision is closely tied to the rationale for the basic rule of immunity expressed in *Hammond v. Howell* — the necessity of exercise of judgment.[55] Without the facts necessary for exercising judgment or any reasonable means of obtaining those facts, the judge could not be liable.

This principle was limited to *ignorantia facti* and was not extended to *ignorantia juris* — ignorance of the law. A judge was presumed to know, or at least was obligated to ascertain, the law. When facts indicating an absence of jurisdiction were before the judge, he could not claim immunity from liability for misapplying those facts. In *Houlden v. Smith,*[56] for example, the facts showed that the plaintiff resided and worked outside the jurisdiction of the court, but the judge erroneously believed that he had jurisdiction to commit plaintiff for contempt for refusing to obey a summons. The judge's misapplication of the law governing jurisdiction was not a ground for immunity and he was found liable in trespass.

There is some inconsistency between the treatment of ignorance of fact and ignorance of law. In a formal sense, the judge is acting no more judicially when he lacks jurisdiction but does not know it because of his ignorance of the jurisdictional facts than when he lacks jurisdiction but does not realize it because of his mistaken opinion of the law. The only explanation for the distinction is the lack of opportunity available to the judge in the first situation to discover his error; in the second situation, however, the opportunity is present and thus his failure to do so may be his own fault. The existence of this inconsistency suggests that although the underpinnings of the law are formal concepts, the development of the law also was shaped by responses to equities presented by particular situations and their relation to the policies inherent in the concepts. This conflict continued to shape the law, even for modern judges who arguably are more sophisticated than their common-law predecessors.

54. 130 Eng. Rep. at 445.
55. 86 Eng. Rep. 816 (C.P. 1677). See notes 44-45 and accompanying text *supra.*
56. 117 Eng. Rep. 323 (Q.B. 1850).

2. Superior and Inferior Courts. — The notion that judicial immunity is based on jurisdiction, or at least based on jurisdiction as it reasonably could have been determined at the time of the act complained of, was important in the development of a second distinction. That distinction, rather obscure for purposes of judicial immunity, was between superior courts and inferior courts. The cases already discussed distinguished between courts of record and courts not of record, but English law through the mid-seventeenth century drew no distinction between superior and inferior courts.[57] At that point, the courts began to approach such a distinction. The process was gradual, and the results uncertain, but examination of the issue is crucial because the notion of a superior court later would be transported to the United States, incorrectly interpreted, and made a basis for a broad judicial immunity.[58]

Holdsworth has suggested[59] that two sources of the distinction between superior and inferior courts lay in Coke's analysis of judicial liability in *The Case of the Marshalsea*[60] and *Floyd v. Barker*.[61] First, because the jurisdiction of a superior court is not limited, the law presumes that nothing is outside the jurisdiction of such a court except as specially appears, and the court itself may determine its own jurisdiction. Accordingly, an erroneous conclusion concerning jurisdiction by a court that has power to determine its own jurisdiction is an abuse of jurisdiction, not an act in absence of jurisdiction, and thus it imports immunity from suit under the basic rule of immunity. On the other hand, an inferior court has no authority to determine its own jurisdiction and a wrong decision by it concerning its jurisdiction is an act in absence of jurisdiction, not an abuse of jurisdiction, and thus there is no immunity. Second, a judge of an inferior court is answerable to a superior court by prohibition or other process for acts in absence of jurisdiction, but superior court judges answer only to God and King. Thus, judges of the latter type of court, but not the former, are immune from suit in another court for acts in absence of jurisdiction.

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57. 6 W. HOLDSWORTH, *supra* note 13, at 238.

58. See notes 158-65 and accompanying text *infra*.

59. 6 W. HOLDSWORTH, *supra* note 13, at 238-39.

60. 77 Eng. Rep. 1027 (C.P. 1610). See notes 35-38 and accompanying text *supra*.

61. 77 Eng. Rep. 1305 (Star Chamber 1607). See notes 23-34 and accompanying text *supra*.

Holdsworth, like others, uses the terms "superior" and "inferior" in an ambiguous manner.[62] In his first point, he defines a superior court as one presumed to have jurisdiction in all cases. His second use of the term is to describe a court that is not subject to prohibition. The two definitions are not coextensive, the second use of the term being more limited than the first. Other commentators have offered different definitions of superior and inferior courts.[63] To understand the meaning of the concepts in the judicial liability context, we turn to the case law.

The first case that suggested the present distinction between superior and inferior courts, although not an immunity case, was *Peacock v. Bell,*[64] which involved a complaint in the Court of County Palatine of Durham. The complaint did not state specifically that the defendant had been indebted at a place within the jurisdiction of the court. The King's Bench held the complaint to be good because the palatine court was a superior court, so the action would be presumed to be within the jurisdiction of the court. The palatine court was a superior court, even though it was inferior to the courts at Westminster and could be restrained by prohibition,[65] because executions on its judgments could not be stayed by writ of error without security. Although not an immunity case, *Peacock v. Bell* is important because it usually is cited for the proposition that a superior court has unlimited jurisdiction.[66] In this different context, the King's Bench used the broader interpretation of superior court.

Terry v. Huntington[67] was the first judicial immunity case to address the distinction between inferior and superior courts. Chief Baron Hale held that remedial action, including actions against judges in appropriate cases, was available for errors committed outside the jurisdiction of a court for all courts except the

62. *See* Thompson, *supra* note 11, at 520-23.

63. *E.g.,* EARL OF HALSBURY, THE LAWS OF ENGLAND 11-13 (1909). Halsbury enumerates the following contemporary courts he defines as superior courts: House of Lords, Judicial Committee of the Privy Council, Supreme Court of Judicature, Court of Criminal Appeal, and Courts of Chancery of Counties Palatine of Lancaster and Durham; presumably their predecessors also were superior courts. The limited enumeration suggests the limits of the definition.

64. 85 Eng. Rep. 84 (K.B. 1667).

65. Thompson, *supra* note 11, at 523.

66. *E.g.,* Sirros v. Moore, [1975] 1 Q.B. 118, 138 (C.A.) (Buckley, L.J.); P. WINFIELD, *supra* note 11, at 211 n.3.

67. 145 Eng. Rep. 557 (Exch. 1668) (action in trover and conversion of goods for acts of the commissioners of excise in levying beyond their authority).

"King's courts at Westminster."[68] This decision suggests a restricted view of which courts are superior courts, including only a few royal courts.

This narrow view was echoed in *Taaffe v. Downes*,[69] which is usually cited as one of the leading cases stating a rule of absolute immunity for superior court judges.[70] The court's definition of "superior court" was quite narrow indeed, consistent with the view in *Terry v. Huntington* that only the King's judges at Westminister were entitled to so high a status. *Taaffe* was an action in trespass for assault and false imprisonment on a warrant against William Downes, Lord Chief Justice of the Court of King's Bench in Ireland. The Court of Common Pleas in Ireland held that the action would not lie, stating reasons characteristic of such cases, including the relation of the judges to the King, judicial independence, and the prevention of vexatious suits. Justice Mayne drew the distinction between superior and inferior courts:

> The difference between the Judges of the superior and inferior courts has not been sufficiently attended to. The King's Judges stand next to, or with the King, or for him, appointed by him, and responsible to him; and he will have his justice done by them, and by them alone. The inferior Judges stand under, and represent the authority of subjects; they have only the responsible power of subjects entrusted to them; or they are placed at a distance in responsibility from the King, and are subject to the control and direction of the superior Courts. An action before one Judge for what is done by another, is in the nature of an Appeal; and is the Appeal from an equal to an equal.[71]

In this and subsequent passages, the court made clear that only the judges who "stand next to, or with the King"[72] were the highest royal judges. Inferior judges "are subject to the control and direction of the superior Courts,"[73] presumably by writ of prohibition, writ of error, or other means of judicial control. The final sentence quoted above indicates that only the few judges who are "equals" are granted the immunity. Actions could be

68. 145 Eng. Rep. at 559.

69. 13 Eng. Rep. 15 (C.P. Ireland 1813).

70. *E.g.*, Sirros v. Moore, [1975] 1 Q.B. 118, 146-47 (C.A.) (Ormrod, L.J.); J. CLERK & W. LINDSELL, *supra* note 11, at 1110 n.20.

71. 13 Eng. Rep. at 17-18.

72. *Id.* at 18.

73. *Id.*

brought "in the nature of an Appeal" before high court judges to review the decisions of many inferior judges, and all of those in the latter category lacked judicial immunity. Superior judges, however, answered only in "the high Court of Parliament" for their conduct.[74] The advancement of this argument was especially easy in this case, since the court repeatedly emphasized the unique position of the defendant, the Chief Justice of King's Bench in Ireland, who possessed the most general jurisdiction of any judge; this position contrasts sharply with that of a justice of the peace, an officer of limited and defined jurisdiction. Finally, another specific indication of the court's interpretation is the statement of Justice Mayne,[75] reviewing the authorities, that no action against a judge was ever sustained and only two such actions were ever attempted, one against the Lord Lieutenant of Ireland[76] and one in King's Bench in England.[77] Justice Mayne could not have been ignorant of the numerous actions against lower judges prior to 1813 heretofore discussed and the inescapable implication is that he referred only to actions against high court judges.

The foregoing discussion of the distinction between superior and inferior courts should not be considered definitive. The law from the seventeenth century forward was somewhat confused, in part because of the paucity of cases in the area, especially cases involving superior court judges. This confusion is, however, important for our purposes, because it could not have permitted an easy adoption of English law in the United States; the English law was just not that straightforward. Holdsworth is instructive:

> I think that, at the end of the seventeenth century, the courts were feeling their way to the distinction upon which the total immunity of the judges of the superior courts rests; but that the gradual way in which it was being arrived at prevented any very

74. *Id.* at 23 (Fox, L.J.).

75. *Id.* at 18 (Mayne, J.).

76. This case apparently is unreported.

77. Hammond v. Howell, 86 Eng. Rep. 1035 (C.P. 1677). *Hammond* often is cited as authority for absolute judicial immunity. In *Hammond*, the judicial officer had general subject-matter jurisdiction over the cause before him, but misapplied the law in ordering the commitment of a jury member. Although the judge had the authority to punish a misdemeanor of a jury member in such a manner, he erroneously found that a misdemeanor had been committed. Thus, the court's broad language concerning the immunity of judges has little relevance to the question of whether a judge is immune for acts committed in absence of jurisdiction.

> clear apprehension of its juridical bases . . . . Indeed, though we get statements of this rule in the eighteenth century, I doubt whether we get any very clear statement of its juridical basis until . . . 1867 . . . .[78]

3. Malicious and Nonmalicious Acts. — The final distinction to be developed in English law was between malicious and nonmalicious acts within the jurisdiction of a judge.[79] This later distinction reflected in part the earlier distinction between superior and inferior courts.

The question of liability for malicious acts arose most frequently with inferior judges and other lower judicial officers, particularly justices of the peace; the absolute immunity of superior court judges extended even to acts done maliciously.[80] Although there is considerable disagreement on this proposition,[81] we conclude that inferior judges were liable for malicious acts within their jurisdiction.[82] This liability developed in part to deal with malfeasance by election officials acting in a judicial capacity,[83] but it was extended to all inferior judges.[84] The basic principle was summarized in *Taylor v. Nesfield*:[85] "If the act of a magistrate is done without jurisdiction, it is a trespass; if within the jurisdiction, the action rests upon the corruptness of the motive; and, to establish this, the act must be shewn to be malicious."[86]

The rules regarding malice have a two-fold origin. First, the notion apparently existed that a malicious act as much as an act in absence of jurisdiction could be characterized as *coram non judice* and therefore unprotected. Second, the rule concerning

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78. 6 W. HOLDSWORTH, *supra* note 13, at 239-40.

79. Malicious acts outside a judge's jurisdiction are treated the same as nonmalicious acts.

80. P. WINFIELD, *supra* note 11, at 207; Rubinstein, *supra* note 11, at 329. There seem to have been no actions brought against superior court judges on this ground, which is itself some support for the proposition.

81. *See generally* Sirros v. Moore, [1975] 1 Q.B. 118, 132 (C.A.) (Lord Denning, M.R.); P. WINFIELD, *supra* note 11, at 207, 216-19; Rubinstein, *supra* note 11, at 326-30; Thompson, *supra* note 11, at 526-33.

82. *See also* Rubinstein, *supra* note 11, at 331-32.

83. *See* Drewe v. Colton, 102 Eng. Rep. 217 (Launceston Assize 1787) (citing Ashby v. White, 92 Eng. Rep. 126 (K.B. 1703), as reversed in the House of Lords, 1 Eng. Rep. 417 (H.L. 1703)).

84. The Justices Protection Acts, discussed *infra* in text accompanying notes 95-102, contemplate an action for malice. Thompson, *supra* note 11, at 520-24, argues that lower judges were immune when acting of record.

85. 118 Eng. Rep. 1312 (K.B. 1854) (Erle, J.).

86. *Id.* at 1314.

malice developed as an adjunct to the doctrine *ubi jus, ibi remedium* — where there is a right, there is a remedy. Chief Justice Holt's dissenting opinion in *Ashby v. White*[87] has been described as the zenith of the influence of this principle[88] and the adoption of his dissent by the House of Lords in reversing the decision of King's Bench[89] added considerable weight to that position. In any event, the rule concerning malice continued in English law[90] and was carried over into American law.[91]

D. The English Law in Perspective

Before turning from the doctrinal development of the English law to the influence of that law in America, we can generalize about the conditions motivating much of the development. In England, as later would be the case in the United States,[92] perhaps the busiest government officials and those closest to the lives of the folk were the local magistrates.[93] In turn, many, probably most, of the actions against judges through the nineteenth century were brought against justices of the peace; this in large part reflects their important role in the administration of justice and general governance during the period. The importance of their role and the unavailability of other means of redress[94] necessitated the limitation of immunity as a protection for the people. Lord Justice Ormrod's judgment in *Sirros v. Moore* noted both this fact and the nature of the response: "In many situations the law provided no other form of remedy, and the courts used this one [*i.e.,* civil liability] so vigorously that Parliament had to intervene on several occasions to temper the wind to the shorn lamb."[95] Additionally, the central judges may have had less sym-

87. 92 Eng. Rep. 126, 134 (Q.B.1703) (Holt, C.J., dissenting).

88. Rubinstein, *supra* note 11, at 317.

89. *See* note 83 *supra.*

90. *See, e.g.,* Linford v. Fitzroy, 116 Eng. Rep. 1255 (Q.B. 1849); Burley v. Bethune, 128 Eng. Rep. 816 (C.P. 1814); Morgan v. Hughes, 100 Eng. Rep. 123 (K.B. 1788). The Justices Protection Act, 1848, 11 & 12 Vict., c. 44, § 1 contemplates actions for malice. *See also* Thompson, *supra* note 11, at 524-33.

91. See notes 192-205 and accompanying text *infra.*

92. See notes 210-18 and accompanying text *infra.*

93. C. BEARD, THE OFFICE OF THE JUSTICE OF THE PEACE IN ENGLAND 155, 165 (1904; AMS ed. 1967); 4 W. HOLDSWORTH, *supra* note 13, at 144, 165. Beard describes the justices' constituency as "the lower orders of society, who had neither the money, the influence, nor the ability to bring their causes to the notice of the crown." C. BEARD, *supra,* at 155.

94. C. BEARD, *supra* note 93, at 151.

95. [1975] 1 Q.B. at 149.

pathy for the local justices and could less readily regard them as true judges, entitled to some of the prerequisites of that station, including immunity from suit.[96] The royal courts may also have found liability to be a useful tool in asserting central authority over the local justices.

Parliament's response was a series of acts regulating the manner in which a civil action could be brought against a justice, although the substantive rules of liability were not changed. The earliest of these was enacted in 1609 and was designed to deter "causeless and contentious suits" brought by "evil-disposed and contentious persons."[97] The preamble of the Act of 1751 illustrates the duality of the problem, protection of the justices and protection of the people:

> Whereas Justices of the Peace are discouraged in the Execution of their Office by vexatious Actions brought against them for or by reason of small and involuntary errors in their Proceedings: And whereas it is necessary that they should be (as far as is consistent with Justice, and the Safety and Liberty of the Subjects over whom their Authority extends) rendered safe in the Execution of the said office and trust: and whereas it is also necessary that the Subjects should be protected from all wilful and aggressive abuse of the several Laws and Statutes committed to the Care and Execution of the said Justices of the Peace . . . .[98]

The remedies and procedures provided by the acts included the assessment of double costs against a losing plaintiff,[99] the requirement of written notice to a defendant justice at least one month before any action was brought, during which time the justice could offer a settlement to the party and pay the offered sum into the custody of the court,[100] and the limitation of damages to nominal amounts for certain wrongful acts except when done "maliciously and without reasonable and probable cause."[101]

The Justices Protection Act of 1848[102] continued the proce-

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96. *Cf.* notes 210-22 and accompanying text *infra.*

97. Justices Protection Act, 1609, 7 Jac. 1, c. 5.

98. Justices Protection Act, 1751, 24 Geo. 2, c. 44. The protection of this Act was accorded to justices of the peace in Georgia when the Georgia Supreme Court held that the Act had been received into the law of Georgia. Warthen v. May, 1 Ga. 602 (1846).

99. Justices Protection Act, 1609, 7 Jac. 1, c. 21.

100. Justices Protection Act, 1751, 24 Geo. 2, c. 44.

101. Justices Protection Act, 1803, 43 Geo. 3, c. 141.

102. Justices Protection Act, 1848, 11 & 12 Vict., c. 44.

dures of the earlier acts and, for our purposes, demonstrates the substantive rules of liability. Section 1 of the Act, providing that actions alleging acts by a justice "done maliciously, and without reasonable and probable cause"[103] could be brought in case, demonstrates the lack of immunity for malicious acts. Section 2, providing that actions alleging acts by a justice "in a matter of which by law he has not Jurisdiction, or in which he shall have exceeded his Jurisdiction"[104] could be maintained as previously provided by law, demonstrates the jurisdictional basis of immunity.

A brief review of the English law of judicial liability through the nineteenth century provides a perspective for the examination of the area in American law. The earliest English law provided for judicial liability. When a rule of immunity developed, it began and remained a limited exception to a general rule of liability to suit. The exception was based on formal notions of the judicial process and judicial office, as well as political considerations, although it later was justified by reference to policy issues. The policy arguments, however, were of limited force, and the exception never was extended very far. Most of those performing judicial functions continued to be liable for erroneous acts outside their jurisdiction even if done in good faith, and for malicious acts. This liability was regarded as a necessary check on improprieties in the administration of justice, although at times even this check had to be counterbalanced by legislative action. The necessity for legislative action itself illustrates the scope of liability.

III. Judicial Liability in the United States

Most jurisdictions in the United States relied heavily on English law in creating their own law of judicial liability, but the American development was not uniform and diverged from the English law at several junctures. In the colonial period, there was little law on the subject, or at least little that is left to be discovered.[105] Following independence, an American law was articulated, based largely on the English law, particularly by James Kent in *Yates v. Lansing*.[106] Kent's interpretation was an adapta-

103. *Id.*

104. *Id.*

105. See notes 114-25 and accompanying text *infra*.

106. 5 Johns. 282 (N.Y. Sup. Ct. 1810), *aff'd*, 9 Johns. 395 (N.Y. 1811). See notes 116-57 and accompanying text *infra*.

tion of the English law to the American circumstance in a way that broadened significantly the scope of immunity. The acceptance of a broad immunity, however, was far from uniform. The states exhibited considerable diversity on the rules applicable to lower judicial officers who were, as in England, treated much differently than higher judges.[107] Again, as in England, the lower judges were most subject to suit, and for many of them the rule was one of liability for extrajurisdictional acts, malicious acts, or both. Following this period of mixed development, Justice Field's opinion in *Bradley v. Fisher*[108] was enormously influential in recasting the doctrinal analysis of state courts, as well as their general approach to problems in this area.[109] By the early twentieth century, the law had begun to shift from a basic position of liability to a preference for immunity, although the culmination of the change was very recent.[110] *Stump v. Sparkman* is the most extreme example of the trend toward immunity. Almost incidentally, Congress played what turned out to be a minor part in the story, attempting to provide a statutory cause of action for judicial wrongdoing in the Civil Rights Act of 1871,[111] but its attempt was subverted by the Supreme Court's obvious misinterpretation of that provision in *Pierson v. Ray*.[112] We will detail this historical outline and then provide a synthetic interpretation of the American development.[113]

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107. For higher judges, see notes 158-65 and accompanying text *infra*. For lower judges, see notes 166-205 and accompanying text *infra*. The terms "higher" and "lower" judge are deliberately imprecise, to reflect the imprecision in the law. See notes 158-65 and accompanying text *infra*.

108. 80 U.S. (13 Wall.) 335 (1872).

109. See notes 285-94 and accompanying text *infra*.

110. See notes 300-06 and accompanying text *infra*.

111. 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1976)).

112. 386 U.S. 547 (1967). Since the Court held in *Pierson* that judges are immune from § 1983 actions, several commentators have concluded that the Court incorrectly interpreted the statute, which was intended to provide a federal cause of action against state judges. The basis for that conclusion, the legislative history of the Civil Rights Acts of 1871 and 1866, has been fully explored in the commentary. Advocates of the Acts viewed Southern judges as a major part of the problem to which the legislation was directed, and both advocates and opponents foresaw judges being liable to suit after passage of the Acts. Kates, *supra* note 4, at 621-23; *Immunity of Judges*, *supra* note 4, at 738-40; *Liability of Judicial Officers*, *supra* note 4, at 327-29. The *Pierson* court was not unaware of the legislative history, which was explained in Brief for Petitioners, at 19-26, and in Justice Douglas' dissent, 386 U.S. at 559-63.

113. See notes 206-45 and accompanying text *infra*.

A. *The Colonial Period*

For the law of judicial liability, as for other areas of law, the colonial period is "the dark ages of American law."[114] The published primary sources of colonial law reveal no law of judicial liability or judicial immunity[115] and the secondary literature reveals little more. Given the scarcity of sources generally,[116] this is not surprising, nor should it be much cause for concern. Whatever the colonial law or practice was, it had almost no effect on the subsequent law. Later courts referred to English authorities but never referred to the colonial experience.

One would not expect a law of judicial liability to have developed in the earliest colonial period. Such law, almost by definition, requires a structure of government more developed than the unitary systems common at the founding of the colonies.[117] Relatively quickly, however, most of the colonies developed governmental organizations almost surprising in complexity.[118] At that point, parties aggrieved by actions of judicial officers had an alternative forum in which to seek a remedy. Further, in prerevolutionary America at least, ensuring the rights of the people by providing checks on official behavior, especially the behavior of officials with as broad judicial and administrative power as local judges,[119] was an issue of general popular moment.[120] Thus, actions at common law frequently were the vehicles for attacking official impropriety,[121] including even alleged usurpations by the imperial authorities.[122] In at least two colonies for which indirect evidence exists, however, it appears that judges both high and low were immune from such suits.[123] Possibly, the explanation for this

114. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 29 (1973).

115. See note 123 *infra.*

116. *See* Flaherty, *An Introduction to Early American Legal History,* in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 3 (D. Flaherty ed. 1969).

117. L. FRIEDMAN, *supra* note 114, at 32-34; 38-39.

118. *Id.* at 34-40. *See* G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS (1960).

119. *See* R. IRELAND, THE COUNTY COURTS IN ANTEBELLUM KENTUCKY 1-2 (1972); W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 14-18 (1975).

120. W. NELSON, *supra* note 119, at 13-18.

121. *Id.* at 17-18; Nelson, *Officeholding and Powerwielding: An Analysis of the Relationship between Structure and Style in American Administrative History,* 10 L. & SOC'Y REV. 187, 192 (1976).

122. *See* J. REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 27-40 (1977).

123. In seventeenth century New York the Court of Assizes was "frequently plagued

is the elite status of most judges,[124] but William E. Nelson's contention that the elite colonial magistrates treated their offices in a personal manner[125] suggests that they should have been subject to a rule of personal liability, similar to that applied to their brethren in other official posts. The lack of evidence suggests that such actions were brought rarely, if at all, whether prohibited by law or merely by custom.

B. From Independence to Bradley v. Fisher

Beginning about the turn of the nineteenth century, the American law of judicial liability expanded. The period from then until the Supreme Court's decision in *Bradley v. Fisher* can be treated as a unit. Within that period, we separate the discussion on doctrinal lines, discussing first the law of judicial liability for the higher judges[126] and then turning to the law for lower judges, describing first the general rules and then the treatment of extra-jurisdictional and malicious acts.

1. Superior Courts. — Throughout this period, superior court judges were treated as immune from civil liability for their judicial acts. The case that principally established this proposition and shaped the law of judicial liability generally was *Yates v. Lansing.*[127] The litigation involved several public figures, the

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by the petitions of unsuccessful litigants who demanded that local judges be censured or removed because of decisions adverse to the petitioners" and refused to hear any such petitions after 1681, only permitting relief by appeal. No mention is made of damage actions. Johnson, *The Advent of Common Law in New York,* in LAW AND AUTHORITY IN COLONIAL AMERICA 74, 79 (G. Billias ed. 1965).

In Massachusetts judges were immune from suit. W. NELSON, *supra* note 119, at 17 n.51. Nelson cites an unreported case that holds justices of the peace liable for certain official misconduct, but the example given is a ministerial act, not a judicial act. *Id.*

The Pennsylvania Provincial Council in 1683 fined the Philadelphia County Court for giving judgment in an action of ejectment when the county court did not have jurisdiction because the land in question was situated in another county. Noble v. Man, 1 Penny. Col. Cas. 27 (1683). Samuel W. Pennypacker, who collected and published the Pennsylvania colonial cases in 1892, commented that "the race of judges who held that a fine should be imposed upon the court for giving judgment against the law soon perished, no successors arose who accepted this view, and the principle failed to become established as a part of our jurisprudence." *Id.* at 28.

124. Nelson, *supra* note 121, at 192-94.

125. *Id.* at 194-97.

126. See note 107 *supra.*

127. 5 Johns. 282 (N.Y. Sup. Ct. 1810), *aff'd,* 9 Johns. 326 (N.Y. 1811). The usual citation is to Kent's majority opinion in 5 Johns. 282. *Yates* was one of four reported decisions generated by the extensive litigation of this matter. *See In re* Yates, 4 Johns. 317 (N.Y. Sup. Ct. 1809), *rev'd sub. nom,* Yates v. People, 6 Johns. 229 (N.Y. 1810); Yates v. Lansing, 5 Johns. 282 (N.Y. Sup. Ct. 1810), *aff'd,* 9 Johns. 326 (N.Y. 1811).

three highest courts of the state, and important public issues including not only judicial liability, but also the protection of personal freedoms from judicial oppression and the right of habeas corpus.[128]

The matter first arose when John Yates, a master in chancery, filed a complaint on behalf of another person to which he signed the name of Peter Yates, a solicitor, instead of his own name and then acted as solicitor in the action, all without Peter Yates' knowledge or consent and in violation of law. Upon discovering this deception, Chancellor John Lansing, Jr. issued a writ of attachment ordering John Yates arrested for malpractice and contempt. Immediately after his arrest, Yates sought and received from Supreme Court Justice Ambrose Spencer a writ of habeas corpus discharging him because the attachment for malpractice was illegal. Chancellor Lansing ordered Yates recommitted, saying the discharge was illegal, despite a New York statute[129] that arguably prohibited such a recommittal following issuance of a habeas corpus.[130]

In its first opinion in the dispute, the supreme court upheld the validity of the chancellor's order to recommit and held the order of discharge void,[131] but the Court for the Trial of Impeachments and the Correction of Errors reversed.[132] Subsequently, Yates brought an action of debt against Lansing for recovery of the penalty assessed in the habeas corpus act.[133] Lansing pleaded the lawfulness of his act and his judicial office as defenses. Yates demurred to the plea, and the supreme court overruled the demurrer and entered judgment for Lansing.[134] On writ of error to the court of errors, the supreme court's decision was affirmed.[135] Kent's supreme court opinion in Yates' damage action against Lansing was the opinion that established the American law of judicial liability.[136] To interpret the relevant statute, Kent turned

128. The contemporary significance of the controversy is shown by the length of the opinions delivered. The four decisions cited in note 127 *supra*, including arguments of counsel, total 305 pages in Johnson's Reports.

129. 1801 N.Y. Laws, c. 65, based on 31 Car. II, c.2 (1660).

130. *In re* Yates, 4 Johns. at 318-19.

131. *Id.* at 317.

132. Yates v. People, 6 Johns. 229 (N.Y. 1810).

133. 1801 N.Y. Laws, c. 65, ¶5.

134. Yates v. Lansing, 5 Johns. 282 (N.Y. Sup. Ct. 1810).

135. 9 Johns. 326 (N.Y. 1811).

136. Kent noted the earlier decision that the Chancellor's order to recommit was lawful, but he discussed the case assuming *arguendo* that the order was not lawful. He

to the English law of judicial liability. Kent's attraction to and facility with English precedents are well known[137] and those qualities are evident in this opinion.

In his statement of the basic law, Kent used the English distinction between superior and inferior courts.

> Where courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non judice,* and all concerned in such void proceedings are held to be liable in trespass . . . . But I believe this doctrine has never been carried so far as to justify a suit against the members of the superior courts of general jurisdiction for any act done by them in a judicial capacity.[138]

Kent praised the "deep root" of this principle at common law and "the wisdom of our forefathers" in establishing it, discussing a variety of English authorities from the Yearbooks to Mansfield. He concluded by citing the general immunity language of *Phelps v. Sill,*[139] which frequently is regarded as the first American judicial liability case, and asking rhetorically whether any sound reading of the habeas corpus act would subvert "such a sacred principle of the common law" as judicial immunity in the absence of clear legislative expression.[140]

The court of errors[141] upheld Kent's decision by a vote of fourteen to five.[142] The principal opinion for the majority, presented by Senator Platt, essentially mirrored Kent's opinion below.[143] In particular, Platt repeated Kent's rule of immunity for judges of general jurisdiction and limited immunity for judges of special or limited jurisdiction.[144]

The contrary opinion was presented by Senator (later Governor) DeWitt Clinton. Clinton emphasized the legal and policy

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also assumed that Yates' malpractice was within the jurisdiction of the court of chancery to punish. 5 Johns. at 288-89.

137. J. HORTON, JAMES KENT: A STUDY IN CONSERVATISM, 1763-1847, at 147-48, 152-54 (DaCapo ed. 1969); *see* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 at 9 (1977).

138. 5 Johns. at 290.

139. 1 Day 315 (Conn. 1804).

140. 5 Johns. at 296.

141. The New York Court of Errors was composed of the Chancellor, the judges of the Supreme Court, and the members of the Senate. N.Y. CONST. art.XXXII (1777).

142. 9 Johns. at 396.

143. Platt discussed at greater length than Kent the lawfulness of Lansing's order of recommitment. *Id.* at 414-20.

144. *Id.* at 424.

limits on the chancellor's authority as limits on his immunity. Because no court in England or America had "jurisdiction coextensive with every object of judicial cognizance," no court's jurisdiction could be unlimited and no judge could be above answering for acts beyond the limits of his jurisdiction.[145] According to Clinton, giving superior courts absolute immunity would create a distinction without reason between those courts and inferior courts and would invest superior courts with too much power over the rights of the people.[146] Impeachment alone was too uncertain a remedy to protect those rights and, thereby, to prevent tyranny.[147]

Senator Clinton's opinion probably failed to prevail not because of the contrary opinion of Senator Platt, but because of the powerful opinion below by Kent. The result was typical. Despite his usual position in the political minority,[148] Kent dominated his brethren and indeed dominated New York law during his tenure as chief justice and later chancellor. His battle strategy was based on erudition; his principal tactic was the long, learned opinion, bursting with historical reference.[149] His opinion in *Yates v. Lansing,*[150] for example, contains references to more than a dozen English authorities, including Coke, Holt, DeGrey, and Hawkins, in accordance with his adherence to what must have been a favorite maxim, *juvat accedere fontes atque haurire*—return to the ancient fountains and drink deeply. The aesthetics of such an opinion were personally pleasing to Kent, but professional concerns were also served. Opinions of this type were useful in establishing the law as a learned and liberal vocation and in providing source materials for members of the bar less learned than the chief justice when few materials had existed previously.[151]

The political significance of the opinion is perhaps the most important factor. The opinion had immediate significance in the

145. *Id.* at 433.

146. *Id.*

147. *Id.* at 435-36.

148. Kent, a Federalist, was subject to a Democratic majority during all but three years of his sixteen-year tenure on the supreme court. J. HORTON, *supra* note 137, at 139-40.

149. *Id.* at 147-52. For a harsh view of this strategy, see P. MILLER, THE LEGAL MIND IN AMERICA 92-94 (P. Miller ed. 1962).

150. 5 Johns. at 291. Kent's interpretation of the English authorities was refuted by Yates' counsel, 9 Johns. at 396-97, 407-12, and by Senator Clinton, *id.* at 432-35.

151. G. WHITE, THE AMERICAN JUDICIAL TRADITION 45-46 (1976). *See* L. FRIEDMAN, *supra* note 114, at 283, 290-91; J. HORTON, *supra* note 137, at 151-52; P. MILLER, THE LIFE OF THE MIND IN AMERICA 109-16, 134-43 (1965).

controversy over reception of English law. This and similar opinions must have infuriated Federalist Kent's Democratic opponents, who were more interested in the originality in American law than in drinking deeply from the ancient fountains of English law.[152] Especially in this case, were the Democratic fears justified, for the old law was used to insulate judges from actions that might be necessary to preserve the people's liberties.[153] Kent, however, was concerned that the liberties of the people might be perverted into license.[154]

Contrasting the opinions of Kent and Clinton illustrates the larger significance of the case as an incident in the contemporary conflict between two conceptions of law, one dying and one nascent.[155] In the eighteenth century view, the "grand basis of the common law" was "the law of nature and its author."[156] Kent's opinion is exemplary for its conclusion that there exists a precise rule of judicial immunity in a form essentially unchanged within the memory of man. For the nineteenth century, however, law was the servant of the present more than the guide from the past.[157] Clinton's opinion is aggressively instrumental, concerned with the rationale and effects of a rule of immunity. It is just as aggressively democratic, probably arousing in those of Kent's ideological persuasion fears of the majoritarian masses overwhelming the judges.

This aspect of *Yates v. Lansing* can be overdrawn. Kent discussed policy; Clinton analyzed precedent. But in each opinion, there is a predominant tone or attitude, revealing an underlying theory of law. We are left with the impression that, for Kent, the *Yates* litigation was an event in the sweep of the common law, to be considered by reference to existing and possibly eternal principles, with issues of current political import secondary except to the extent necessary to protect judicial independence. For Clin-

152. *See* L. FRIEDMAN, *supra* note 114, at 94-99; J. HORTON, *supra* note 137, at 140-46; P. MILLER, *supra* note 151, at 105-09, 121-34.

153. See J. HORTON, *supra* note 137, at 186-88. This argument was made in the court of errors by Yates' counsel, 9 Johns. at 396-97, and by Senator Clinton, *id.* at 433.

154. J. HORTON, *supra* note 137, at 186-88.

155. *See generally* M. HORWITZ, *supra* note 137, *passim;* W. NELSON, *supra* note 119, at 165-74; Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America,* 87 HARV. L. REV. 513 (1974). *But see* R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW (1977).

156. M. HORWITZ, *supra* note 137, at 4 (quoting J. OTIS, *A Vindication of the British Colonies,* in PAMPHLETS OF THE AMERICAN REVOLUTION 563 (B. Bailyn ed. 1965)).

157. *See id.* at 16-30. *See generally* sources cited at note 155 *supra.*

ton, the litigation was an event looking to the future, part of the shaping of a democratic republic in which rights of the people could be secured against oppression from judges and others.

We have departed somewhat from the central thread of our argument, but usefully so, for Kent's opinion is seminal and it must be understood in context. With this background, we now analyze the structure of the law of judicial liability created by Kent.

Kent held "members of the superior courts of general jurisdiction"[158] immune from suit for any judicial act.[159] In *Yates,* using the common law of immunity to interpret the habeas corpus act, Kent found that Chancellor Lansing's action was not invalid under the act, but in so finding Kent extended the notion of superior court. The English concept of a superior court originated in the close relationship between royal judges and the source of their authority, the sovereign.[160] As the concept developed over a long period of time, at least up to the time of Kent, its precise meaning was uncertain, but it clearly applied only to a very limited number of courts.[161] In America, there were no such superior courts, strictly speaking. Indeed, by Kent's time the notion that courts derived their authority from the will of the people[162] contradicted the very idea of a superior court. As Senator Clinton pointed out, the people had delegated to no court in law or equity cognizance of all legal subjects, and therefore every court was a court of limited jurisdiction.[163] Kent, however, created an American analogy to the English superior court: the court of general jurisdiction. The analogy was not absurd, but neither was it consistent with the development or policies of the Engish law nor, more importantly, was it adequately justified in Kent's opinion.[164]

158. 5 Johns. at 290.

159. Kent did not define "judicial act," but his examples suggest that the concept of judicial act was broader than that of jurisdiction; this was also true in English law. *See, e.g.,* Floyd v. Barker, 77 Eng. Rep. 1305 (Star Chamber 1607).

160. See notes 69-74 and accompanying text *supra.*

161. See notes 57-78 and accompanying text *supra.*

162. W. NELSON, *supra* note 119, at 90.

163. 9 Johns. at 433.

164. A possible justification was offered subsequently by Justice Field in Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868), that American superior judges are answerable only to the people through removal from office, just as English superior judges are answerable only to the King. *Id.* at 537. Interestingly, this argument is one that would have had more validity in Kent's time, when frequent removal of judges was a contemporary issue, than in 1869, when the pattern of removal only in the most extreme cases had been set. *See* L. FRIEDMAN, *supra* note 114, at 113-16. We may speculate that if the thought had occurred

The absolute immunity of the few highest judicial officers in England, established because of their close ties to the crown, was transferred by this method to a large number of judges in America.[165]

The influence of Kent's statement and application of the rule were widespread. Until Justice Field's opinion in *Bradley, Yates* was the leading American authority. This branch of Kent's rule, immunity for judges of general jurisdiction for their judicial acts, was uniformly accepted. In fact, acceptance of immunity was so great that it is difficult to demonstrate because of the small number of cases. Suits against high judges such as Chancellor Yates were barred either under Kent's rule or under Field's later revision of that rule. As in England, however, judicial liability still remained a check on judicial wrongdoing and was directed against those who handled the bulk of the judicial business, the lower judges.

2. Inferior Courts. — The second half of Kent's rule concerns judges of courts of "special and limited jurisdiction."[166] In America, as in England, such judges were subject to a much narrower rule of immunity and were exposed to suit more frequently than were higher judges; the latter circumstance was both cause and result of the former.

The initial rule applied to judges of limited jurisdiction was immunity from suit for any judicial act within their jurisdiction. *Phelps v. Sill,*[167] one of the earliest American judicial liability cases, is illustrative. In *Phelps,* plaintiff alleged that a probate judge had appointed a notorious bankrupt as plaintiff's guardian during plaintiff's minority and had not required adequate security of the guardian. The Supreme Court of Connecticut in a brief

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to Kent, he would have been reluctant to advance it, for his own political situation was sufficiently precarious that his opponents might have seized the suggestion and attempted to remove him from office.

165. The extent to which the types of judges protected by this rule expanded from the English practice is demonstrable by example. Among the cases establishing the English doctrine were Terry v. Huntington, 145 Eng. Rep. 557 (Exch. 1668) (judges of the "King's courts at Westminister"), and Taaffe v. Downes, 13 Eng. Rep. 15 (C.P. Ireland 1815) (Chief Justice of the Court of King's Bench in Ireland). In later New York cases, those covered by the immunity included the recorder of the city of Albany, Ayers v. Russell, 57 N.Y. Sup. Ct. 282 (App. Div. 1888), and a United States district judge, Lange v. Benedict, 73 N.Y. 12 (1878) (noting that although a United States judge necessarily has limited jurisdiction, he is not thereby an "inferior" judge).

166. 5 Johns. at 290.

167. 1 Day 315 (Conn. 1804).

opinion reversed a judgment for the plaintiff, affirming the "settled principle" that a judge would not be liable for error of judgment in the exercise of his power as a judge. Without citation to authority, the court stated that this immunity was necessary to protect judicial independence in making decisions on uncertain points of law.[168]

The basic rule for inferior judges was thus the same as for superior judges: immunity for good faith acts within their jurisdiction. At this point, the consistency in treatment ended. If the motivation for a broad rule of immunity was the concern for judicial independence expressed in *Phelps* and many other cases, other aspects of the immunity accorded inferior judges should have been the same as that given superior judges. Instead, some jurisdictions deviated in their treatment of immunity for inferior judges, first regarding extrajurisdictional acts and then regarding malicious acts.

(a) Extrajurisdictional acts. — In *Yates v. Lansing,* Kent stated: "Where courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non judice*, and all concerned in such void proceedings are held to be liable in trespass."[169] Kent did not have to elaborate on this proposition because *Yates* concerned a judge of general jurisdiction, but this statement reflects both the majority view of American courts prior to *Bradley v. Fisher,* that limited jurisdiction judges were liable for wrongful acts outside their jurisdiction, and the style of reasoning supportive of that view, a formal style based on a rigid concept of jurisdiction.

Kentucky law provides a good illustration of this approach because there were a relatively large number of judicial liability cases in Kentucky and because a more extensive account of the contemporary Kentucky judicial system exists than is available for most other states.[170] The earliest Kentucky decision, *Gregory v. Brown,*[171] established the basic rule that a justice of the peace was immune from liability for erroneous acts committed by him within his jurisdiction. Shortly thereafter, in *Ely v. Thompson,*[172] the court established the inverse proposition, that an act outside

168. *Id.* at 329.
169. 5 Johns. at 290.
170. *See* R. IRELAND, *supra* note 119. See notes 213-18 and accompanying text *infra.*
171. 7 Ky. (4 Bibb.) 28 (1815).
172. 10 Ky. (3 A.K. Marsh.) 70 (1820).

the justice's jurisdiction would expose him to liability. In *Ely,* the justice apparently did not realize that he was acting under an unconstitutional statute, but he was liable for the excess of jurisdiction because he was held to have constructive knowledge of the unconstitutionality. In the leading Kentucky case, *Revill v. Pettit,*[173] the supreme court reaffirmed these principles in upholding a jury instruction that a justice of the peace would be liable for exceeding his statutory jurisdiction despite having acted in good faith. An act in excess of jurisdiction was not a judicial act; the act therefore was void and incapable of supporting a defense based on judicial status. While the justice's motivation might be relevant to the determination of the extent of damages, it was irrelevant to the issue of liability. The notion of jurisdiction as the basis for immunity is objective and formal: a malicious act within the jurisdictional limits is not actionable, but a good faith act beyond those limits is actionable.[174] Typically, the objectivism and formality were explicit and unapologetic.[175]

Courts in other states also stated a rule of liability for erroneous or wrongful acts outside the jurisdiction of a judge of limited jurisdiction. Sometimes, courts stated the rule in the course of a decision affirming a judgment against a defendant justice,[176] and sometimes, in dicta in reversing such a judgment when it was found the defendant acted within his jurisdiction.[177] Usually, the style of decision was the same as used by the Kentucky court, a formal style relying heavily on precedent and on a mechanical concept of jurisdiction.[178]

The minority approach to extrajurisdictional acts of lower court judges embodied a rule of immunity. The broadest rule of immunity was granted in South Carolina, beginning with *Reid v. Hood,*[179] which concerned an action in trespass against a justice

173. 60 Ky. (3 Met.) 314 (1860). In *Revill,* a justice of the peace was sued for assault and false imprisonment for examining and committing a felony defendant without bringing him before a second magistrate as required by statute.

174. *Id.* at 318-19.

175. *See also* Scott v. West, 64 Ky. (1 Bush.) 23 (1866).

176. *E.g.,* Sasnatt v. Weathers, 21 Ala. 674 (1852).

177. *E.g.,* Craig v. Burnett, 32 Ala. 728 (1858); Deal v. Harris, 8 Md. 40 (1855); Burnham v. Stevens, 33 N.H. 247 (1856); Little v. Moore, 4 N.J.L. 82 (1818). *See also* Cunningham v. Dilliard, 20 N.C. (3 & 4 Dev. & Bat.) 350 (1839).

178. *E.g.,* Burnham v. Stevens, 33 N.H. 247 (1856) (citing *Yates* and stating that a lack of jurisdiction is "fatal" to a defense of judicial immunity).

179. 11 S.C.L. (2 Nott & McC.) 168 (1819). An earlier case included dictum that "no suit will lie against a judge for any opinion delivered by him in his official capacity." Brodie v. Rutledge, 1 S.C.L. (2 Bay) 70 (1796).

of the peace for issuing an attachment against property in a matter outside his jurisdiction. In affirming a verdict for the defendant, the constitutional court stated that to prevent vexatious litigation and to protect judicial independence, a justice who made an erroneous decision would be immune from suit even though the matter was outside his jurisdiction.[180] Noting the distinction between judicial and ministerial officers, Justice Richardson argued that because the function of a judicial officer is to give judgment, he must be protected when he does so.[181] The *Reid* opinion, aggressively and completely policy-oriented, is as fine an exemplar of an instrumental approach as Kent's opinion in *Yates v. Lansing*[182] and Justice Duvall's opinion in *Revill v. Pettit*[183] are of a formalistic one. Except for a passing reference to the lack of prior cases establishing judicial liability and a general reference to Blackstone,[184] the opinion is completely devoid of precedential authority, relying instead on a discussion of the practical necessity for a rule of immunity. The contrast to the Kentucky approach is apparent, with the Kentucky courts finding liability when formal jurisdictional limits are exceeded and the South Carolina courts extending immunity beyond those limits when the judge in fact, though not in law, acts judicially.[185] The *Reid* doctrine was applied in later cases to immunize a magistrate who after deliberation had violated an "obvious duty" to bail a party instead of committing him to jail[186] and a magistrate

180. 11 S.C.L. (2 Nott & McC.) at 172.

181. *Id.* at 169-70 ("In all judicial questions, then, the very aim and duty of the officer is to give his true opinion after due enquiry; if erroneous, he can no more answer for the error than for the head which heaven has given him.").

182. See notes 149-52 and accompanying text *supra.*

183. See notes 173-75 and accompanying text *supra.*

184. 11 S.C.L. (2 Nott & McC.) at 170, 172.

185. Although we discuss later the effect of *Bradley* on the state courts, its effect on the approach of the South Carolina courts is particularly interesting. In McCall v. Cohen, 16 S.C. 445 (1881), the traditionally broad South Carolina rule of immunity was merged with Justice Field's analysis. In *McCall,* the court held a trial justice immune from suit despite his rendering a void judgment since he had subject-matter jurisdiction; this situation was analogous to excess of jurisdiction in the *Bradley* distinction between excess and absence of jurisdiction. *Reid* was a similar case in the court's view. *Id.* at 449-50. The court adopted Justice Field's style of reasoning and substantive analysis, abandoning the policy-oriented jurisprudence of *Reid* for the formalism of *Bradley.*

186. Young v. Herbert, 11 S.C.L. (2 Nott & McC.) 172 (1819). As in *Reid,* the court noted that in some circumstances the failure to discharge such a simple duty would raise an implication of malice and remove the immunity, but when the magistrate deliberated prior to making his decision, no malice was present. *Id.* at 173.

who had issued a warrant without jurisdiction.[187]

No other state provided as much immunity for judges of limited jurisdiction as did South Carolina, but some states did moderate the severity of the majority rule of liability for extrajurisdictional acts, usually by distinguishing the extent to which jurisdiction had been exceeded. In Indiana, for example, in *State ex rel. Conley v. Flinn,*[188] the court distinguished what it called "act[ing] illegally and erroneously"[189] from acting without jurisdiction and found that sureties on the official bond of a justice of the peace were not liable when the justice issued improper process. Subsequently, in *Dietrichs v. Schaw,*[190] the court held liable a justice of the peace who issued an arrest warrant without even general subject-matter jurisdiction, distinguishing that mistake from a mere mistake in judgment. Similarly, an Illinois court, in *Lancaster v. Lane,*[191] distinguished between want of jurisdiction and abuse of jurisdiction, and held that a justice of the peace who had jurisdiction over a case was not liable for erroneously fining parties for engaging in an altercation in the course of proceedings.

(b) Malicious acts. — For malicious acts within the jurisdiction of a lower court judge, the courts again developed competing rules of liability and immunity, but here the competing positions attracted approximately equal numbers of adherents. Courts employed the same mode of analysis as was used to examine liability for extrajurisdictional acts, but often with different consequences.[192]

The South Carolina courts established an immunity for extrajurisdictional acts on policy grounds, but the same analysis applied to malicious acts produced a rule of liability. The former rule was based on the desire to protect the justice's exercise of independent, though erroneous, judgment;[193] when there was no such exercise of judgment because the justice was motivated by factors properly extraneous, there was no need for protection, the difference being between a "head mistaken" and a "heart de-

187. Miller v. Grice, 30 S.C.L. (1 Rich.) 147 (1844).

188. 3 Blackf. 72 (Ind. 1832).

189. *Id.* at 74.

190. 43 Ind. 175 (1873).

191. 19 Ill. 242 (1857).

192. Again, in some cases the state's "rule" must be drawn from dicta. *See* notes 176-77 and accompanying text *supra.*

193. See note 181 and accompanying text *supra.*

praved."[194] Because of the difficulty of proving subjective malice, a doctrine of a constructive malice was developed; proof that the action was grossly outside the norm permitted an inference of malice.[195]

Courts in other states that developed a rule of liability for malicious acts did so on less overtly policy-oriented grounds. In *Howe v. Mason,*[196] the Iowa Supreme Court used precedent to a large extent, and policy to a lesser extent, in restricting immunity to judges who acted in good faith. The Tennessee court arrived at the result indirectly, starting from the position that a judge is immune from suit for honest errors of judgment[197] and subsequently filling out the rule by stating that only malice, either expressed or implied by conduct, would provide the basis for suit.[198]

Those states that immunized lower court judges for their malicious acts did so in a style that became characteristic of immunity cases.[199] For example, two 1843 Missouri cases established an absolute rule of immunity for acts within the jurisdiction, even for malicious acts of justices of the peace. In *Stone v. Graves,*[200] an action in case brought against a justice for corrupt refusal to enter a judgment and for neglect of office by which a promissory note was lost or destroyed, the court relied on *Yates v. Lansing* and English authorities expressing the policies favoring judicial independence and discouraging vexatious litigation and held lower judges immune for all judicial acts within their jurisdiction, even when malice was alleged.[201] In *Lenox v. Grant,*[202] an action against a justice for malicious issuance of a warrant, the court reaffirmed its position and explained that a judge acting in a ministerial capacity could be liable for misfeasance even though the same judge acting in a judicial capacity would not be liable even for malfeasance. For a ministerial act, the act itself was the cause of oppression and therefore would be

194. Reid v. Hood, 11 S.C.L. (2 Nott & McC.) 168, 170 (1819). *Accord,* Young v. Herbert, 11 S.C.L. (2 Nott & McC.) 172 (1819).

195. *See* Young v. Herbert, 11 S.C.L. (2 Nott & McC.) at 173.

196. 14 Iowa 510 (1863).

197. Hoggatt v. Bigley, 25 Tenn. (6 Hum.) 236, 238 (1845).

198. Cope v. Ramsey, 49 Tenn. (2 Heisk.) 197 (1870); Boyd v. Ferris, 29 Tenn. (10 Hum.) 406 (1849).

199. See notes 239-42 and accompanying text *infra.*

200. 8 Mo. 148 (1843).

201. *Id.* at 150.

202. 8 Mo. 254 (1843).

actionable, but, for a judicial act, "it is the erroneous judgment that produces or causes the oppression."[203] Since a determination of malice or good faith behind the judgment could only be made by "the great searcher of hearts"[204] and not by a jury, it would be impossible to impose liability in the absence of confession. The court did recognize, however, that malfeasance could be the basis for public sanction such as indictment despite the same proof problems.

While other examples of immunity for malicious acts could be given,[205] the point relevant to our analysis is the method by which the decisions were reached. The basic authorities were traditional ones, English and American, sometimes misinterpreted by state courts to apply to justices of the peace. In their decisions, courts typically argued the policies favoring judicial immunity, such as protection of judicial independence and prevention of vexatious litigation. The use of policy arguments, however, was almost superficial; the opinions in these cases were decidely formal, even formulaic, but not policy-oriented. The opinion writers followed a pattern that made use of both precedent and policy, but the repeated application of the pattern makes it difficult to regard policy as the primary motivation for the result. The pattern began with a statement of the rule of immunity for acts within the justice's jurisdiction. That immunity was then justified on policy grounds and extended to any act within the jurisdiction, even if malicious. Finally, the extension would be supported on similar policy grounds. The key concept throughout was the formal notion of jurisdiction; any acts outside the boundary are actionable, any acts inside the boundary are not. The courts did not seriously weigh the policy issues. Had the courts done so, they would have been forced to deal with the anomaly of holding one judge liable for acting in the honest belief that he had jurisdiction, while holding another immune though he deliberately abused his office.

3. Interpretation. — Our examination of the law of judicial immunity prior to *Bradley* demonstrates that it is incorrect to assume that judicial immunity from civil suit is a uniform princi-

203. *Id.* at 255.

204. *Id.*

205. *See, e.g.,* Bailey v. Wiggins, 6 Del. (1 Houst.) 299, 305 (1856); Stewart v. Cooley, 23 Minn. 347, 350-51 (1877); Taylor v. Doremus, 16 N.J.L. 473, 474 (1838); Furr v. Moss, 52 N.C. (7 Jones) 525, 527 (1860).

ple, long established at common law. Immunity was the rule for some judges some of the time, but just as in England, American courts also held many, if not most, judicial officers liable for their wrongful acts much, if not most, of the time. This conclusion significantly weakens a principal support for judicial immunity decisions from *Bradley* to *Stump*, the support afforded by historical precedent. Our review of the history, however, is intended not only to refute a spurious rationale for judicial immunity, but also to provide insight into the development of the law in a way that will illuminate the meaning of current developments and the entire issue of judicial liability. To accomplish this, we will concentrate on the way judges perceive the situations that result in judicial liability cases,[206] how the judges respond, and what that response reveals about the judges' beliefs.[207] This method is responsive to a number of currents in contemporary social and legal theory[208] which we hope to modestly advance by illustration.

The judicial response to civil actions against other judges was shaped by two sets of variables. The first set includes the trial judge's perception of the many facets of the judicial liability problem: the type of judge involved as defendant, the interests of the plaintiff and, more broadly, the public, and the demands of the judicial system and legal profession. The second set of variables includes the judge's perception of his own role as a judge, particularly an appellate judge, in a democratic society.

The most distinctive feature of the law of judicial liability in this period is that it was created by state courts of last resort, but it affected principally those on the lower rungs of the judicial ladder — the magistracy. Judicial liability cases usually concerned justices of the peace, county judges, probate judges, and

206. We state that the situations exist prior to their presentation as legal issues to emphasize that there is a reality prior to the labelling of incidents as part of the judicial liability problem by appellate courts. The interactions between parties and judges also affect the law; one of our suggestions is that there is a general perception of such situations as usually not giving rise to a cause of action, which becomes legally significant when expressed by courts. *See* Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977).

207. Roberto Unger labels this correspondence between belief and conduct "meaning". R. UNGER, LAW IN MODERN SOCIETY 245-48 (1976).

208. *See generally* R. UNGER, KNOWLEDGE AND POLITICS (1975); R. UNGER, *supra* note 207; Gabel, *supra* note 206; Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1667 (1976) [hereinafter cited as *Form and Substance*]; Kennedy, *Legal Formality*, 2 J. LEG. STUD. 351 (1973) [hereinafter cited as *Legal Formality*].

the like.[209] The high position of the magistrate in the colonies has been previously mentioned,[210] but that position did not continue for long after the Revolution. The sources of the decline in the status of lower judicial offices and in the quality of incumbents included the collapse of accepted social values, the emergence of a new democratic spirit, and the growth of government in society;[211] the effects of this decline are clear. While an earlier justice of the peace could usually eschew formal enforcement mechanisms because of the informal resources he could command from his status as a member of a local gentry, a nineteenth century justice was more likely to be principally a legal official rather than a social leader; the nature of his office was transformed accordingly.[212]

Robert Ireland has described the situation in Kentucky, a state that developed a considerable body of law on judicial liability.[213] The number of justices grew throughout the period until, prior to the constitutional change of 1848, there were 1,550 such officers in the state,[214] while the population was approximately 980,000.[215] Necessarily, many of the justices were ill-trained; in 1850, 80 percent were farmers and only 5.6 percent were lawyers.[216] Frequently the justices were ill-suited for their jobs. Complaints of inattendance, drunkenness, and failure to maintain order in the courtroom were common.[217] These problems would have been barely tolerable if the justices were peripheral officers, but the situation was exacerbated by their crucial role in administering the important and controversial functions of probating wills, overseeing estate administration, protecting orphans, and appointing guardians. Despite frequent intervention by courts of equity, the situation was at best confused, and complaints about

209. This pattern is similar to the structure of judicial administration in most states, with a few judges exercising appellate and, at least in the early years, general trial jurisdiction, and the lower judges exercising petty and specialized jurisdiction. L. FRIEDMAN, *supra* note 114, at 123-25.

210. See notes 124-25 and accompanying text *supra*.

211. Nelson, *supra* note 121, at 206-07.

212. *Id.* at 191-99, 206-12.

213. R. IRELAND, *supra* note 119. The literature on the lower courts in this period is quite limited and Ireland's treatment is the most informative.

214. *Id.* at 8.

215. Kentucky's population in 1850 was 982,000. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 at 28 (1976).

216. R. IRELAND, *supra* note 119, at 14. *See id.* at 150-53.

217. *Id.* at 80, 146-49.

the performance of the justices were numerous.[218]

Thus, the first thread in understanding the appellate judge's approach to judicial liability is to recognize his perception of the defendant. The legal distinction between superior and inferior judges[219] would have made considerable sense to a man like Kent; the distinction was based as much on perceived reality[220] as on jurisdictional limits. The idea that lower judges were more in need of control from above and should therefore have a more limited immunity from suit would have been intuitively appealing. The transfer of the English distinction, which, after all, was based on similar grounds,[221] was consequently facilitated.[222]

The appellate judge's perception of the plaintiff's interest in the action was also important. The protection of the liberties of the people was a central concern following the Revolution, and chief among the liberties to be protected was security against arbitrary action or wrongful injury by government officials.[223] This concern was expressed in many ways, including a willingness to impose liability on judicial officers when they exceeded their authority. Judges were servants of the people, no longer agents of a foreign power, but their service was circumscribed by the limits of the power popularly entrusted to them.[224] The execution of this position, however, was limited because of its interaction in the

218. *Id.* at 18-23.

219. *See* notes 166-68 and accompanying text *supra.*

220. *See* note 206 and accompanying text *supra.* The phrasing of the text suggests a preexisting reality which is perceived by the judge, but that suggestion is inaccurate. The point to be emphasized is that the distinction between superior and inferior judges is not one arrived at by the appellate judge after reflection, but rather a part of the legal phenomena of the time, which the judge then expresses through the law of judicial liability. The difference is one between instrumentalism and phenomenology. Unfortunately, no clear explication of legal phenomenology exists. Gabel, *supra* note 206, is the most comprehensive attempt to provide one, but his idiom is very difficult.

221. See notes 92-102 and accompanying text *supra.*

222. Although we have not done sufficiently comprehensive research to fully support the proposition, we may speculate that one reason for the development of a unique approach to judicial liability in South Carolina, see notes 179-87, 193-95 and accompanying text *supra,* is the composition of the lower courts in that state. Apparently, after a brief interlude with untrained magistrates, South Carolina returned to the pre-Revolutionary tradition of an elite, qualified magistracy, and therefore the perception of lower judges stated in the text may not have existed. *See* R. BROWN, THE SOUTH CAROLINA REGULATORS 13-14, 22-29 (1963); D. WALLACE, SOUTH CAROLINA: A SHORT HISTORY, 1520-1948, at 412 (1966). Following the Revolution, South Carolina's legal culture was generally sophisticated and progressive. *See* F. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 121-23 (DaCapo ed. 1969).

223. M. HORWITZ, *supra* note 137, at 14-16; W. NELSON, *supra* note 119, at 89-101.

224. M. HORWITZ, *supra* note 137, at 14-16.

judicial consciousness with the other elements of the problem. The threat to the people's liberties was perceived to be from lower officers who were the most common point of public contact with the judicial system and the most likely to infringe popular liberties due to inadequate training and ability;[225] the judges making the law saw no need to secure the people's rights against themselves.

Yet another element of the first set of variables was a concern for systemic and professional values, specifically in the context of the judicial liability problem. The policy arguments in support of judicial immunity made most frequently throughout this period, as later,[226] included the fear of vexatious litigation, the degradation of the judiciary in the eyes of the public, and the loss of judicial independence. These fears were real, and at the time, not unjustifiable. Given the extent of public antipathy for the bar and the judiciary following the Revolution[227] and the variety of reform proposals,[228] we can understand how the judges could see themselves as besieged and how therefore they naturally would be concerned with maintaining and increasing the integrity of the process from which they derived their power and position. The picture of a high judge as a defendant before the bench, not presiding on it, could not have been pleasant, especially because the prospect was not unrealistic given the many contemporary controversies involving judges.[229] Accordingly, the expressions of concern in the opinions[230] are understandable, and the conclusion, forestalling such unseemly occurrences by immunizing judges, while not predictable, was at least highly probable.

As before, the distinction in treatment generally observed between judges high and low may be understood by the interaction of the systemic concerns with the appellate judges' perceptions of the differences between the types of judicial officers. Although justices of the peace were most likely to be influenced by the threat of litigation and most likely to be less independent if

225. See notes 210-18 and accompanying text *supra.*

226. See note 363 and accompanying text *infra.*

227. L. FRIEDMAN, *supra* note 114, at 265-66; C. WARREN, A HISTORY OF THE AMERICAN BAR 212-24 (1911); Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840,* 14 AM. J. LEGAL HIST. 283 (1970); Nash, *The Philadelphia Bench and Bar, 1800-1861,* in 7 COMP. STUD. IN SOC'Y & HIST. 203, 209-14 (1965).

228. L. FRIEDMAN, *supra* note 114, at 277; Nash, *supra* note 221.

229. *See, e.g.,* L. FRIEDMAN, *supra* note 114, at 111-16.

230. *E.g.,* Phelps v. Sill, 1 Day 315, 329 (Conn. 1804).

more exposed to liability, the degradation of such officers would not be as disastrous because of their more mundane position. Additionally, the image of a justice of the peace as defendant would be less distasteful than that of a superior court judge in the same position because justices were of a class of government officials who usually had been answerable to suit for their errors.[231] Because they were judges, justices were entitled to protection when they acted in their judicial capacity, but when they overstepped their bounds, the necessity of restraining them in favor of the popular rights outweighed any loss in judicial stature.

Professional values were related to systemic values on this point. The struggle in this period sought not only to establish the position of the bench, but to raise the position of the bar as well.[232] Here the prevention of judicial degradation was linked to the advancement of the legal profession, since the judges were ostensibly the leaders of the legal profession. Moreover, as the uniqueness, the professionalism, and, indeed, the mystery of the legal process were increasingly emphasized, the exposure of agents of the process, and thereby the process itself, to scrutiny in civil actions became less desirable, given the goal of elevating the position of the bar. Again, such professional concerns were less weighty in the case of lower judges, because lower judges were generally not professionals.[233] Concomitantly, they deserved less consideration on these grounds to emphasize the differences between legal professionals and others who happened to exercise legal functions.

The second set of influences on the judges' decisions in judicial liability cases included more general concerns with the judicial role in the democratic process. The first of these influences was the use of the English law of judicial liability. Despite widespread antipathy for English law in the new nation,[234] early American courts made extensive use of the English principles and precedents. The impression conveyed is different for two groups of judges, consonant with their different positions in the controversy over the reception of English law.[235] Most judges believed that the arguments in support of the rules developed were advanced sig-

231. See notes 121-22 and accompanying text *supra.*
232. *See* P. MILLER, *supra* note 151, at 99-116.
233. See note 216 and accompanying text *supra.*
234. L. FRIEDMAN, *supra* note 114, at 94.
235. *Id.;* P. MILLER, *supra* note 151, at 121-34.

nificantly by the fact that they paralleled English rules,[236] but for some judges the process was modified, with opinions and analyses beginning with the English law as real authority, not only as additional support.[237] For both groups, the English law was reinterpreted in important ways,[238] but its structure was preserved as the basis of American law.

The second general influence is the judicial style deemed appropriate for this body of law.[239] As our comments on the influence of English law would suggest, some courts utilized a formal style of reasoning, resolving issues by the application of existing authority.[240] A few courts, however, approached issues as policy matters, adopting a result-oriented style that made diminished use of precedent.[241] Gradually, the dominant style for courts favoring immunity became what we have labelled not so much formal as formulaic, mixing precedent and policy without real deliberation, but using instead an established path to a predictable result.[242] This style permitted courts to ignore the doctrinal inconsistencies they created. It also reflects what is sometimes forgotten in the judicial styles debate, that all common-law systems are formal to some extent, so that questions of judicial style are most important at the periphery of the law and many common issues are easily resolved and thus do not require extensive inquiry, either formal or instrumental.

To conclude the discussion of the factors shaping judges' decisions in this area, we suggest a few of the ways in which these

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236. *E.g.*, Deal v. Harris, 8 Md. 40 (1855); Little v. Moore, 4 N.J.L. 84 (1818).

237. Kent is the best example. *See* Yates v. Lansing, 5 Johns. 282 (N.Y. Sup. Ct. 1810).

238. *See* notes 158-65 and accompanying text *supra.*

239. The debate over styles of judicial reasoning and the approaches to law expressed therein has increased of late. *See* R. BRIDWELL & R. WHITTEN, *supra* note 155; M. HORWITZ, *supra* note 137, *passim;* W. NELSON, *supra* note 119, at 165-74; *Form and Substance, supra* note 208; Legal Formality, *supra* note 208; Nelson, *supra* note 155; Paine, *Instrumentalism vs. Formalism: Dissolving the Dichotomy,* 1978 WISC. L. REV. 997; Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century,* 1975 WISC. L. REV. 1. Most of the debate has been directed at private law adjudication, necessitating some extrapolation to deal with what is basically a public-law issue.

240. *E.g.*, Holcomb v. Cornish, 8 Conn. 374 (1831); Deal v. Harris, 8 Md. 40 (1855); Gordon v. Farrar, 2 Doug. 411 (Mich. 1847); Yates v. Lansing, 5 Johns. 282 (N.Y. Sup. Ct. 1810).

241. South Carolina is the best example. See notes 179-87 and accompanying text *supra.*

242. See note 205 and accompanying text *supra.*

influences changed over time, thus altering judges' perception of the issue, and the relationship of those changes to changes in the law.[243] First, as state judicial systems became further articulated and further professionalized during the nineteenth century,[244] the perception of the lower judges as an inferior class declined. The quality of the incumbents may not have improved greatly in the shift from semi-rural justices of the peace to urban lower trial judges,[245] but the perception of the officers arguably did. The later officeholders were seen more as true judges, despite the lack of verifiable increase in actual competence. The distinction between superior and inferior judges became less pronounced and their common status as judicial officers was more important than any differences in jurisdiction or ability. Second, the interest in protecting the rights of the people faded to some extent after the revolutionary ardor cooled. This is not to say it became a trivial issue, but it did become an issue of less general concern as the public attention and especially judicial attention were diverted to other matters. For example, the Supreme Court that decided *Bradley v. Fisher* was on the verge of an era when the rights of the propertied classes in an orderly society were seen to be the rights most worthy of protection, in preference to the claims of a majoritarian movement.[246] Third, the necessities of judicial administration became increasingly important as the judicial system became larger and more complex.[247] The threat of disruption from private suits against judges was a significant danger at a time when the system was barely able to function even without such interference. The demands of professionalism also increased as the extent of professionalization grew, and thus both systemic and professional demands made judicial liability less appealing.

C. Bradley v. Fisher

The leading judicial liability case prior to *Stump* was the

243. Some of these changes, especially the first and the third, continued past the time of *Bradley*.

244. L. FRIEDMAN, *supra* note 114, at 336-39. *See, e.g.*, Surrency, *The Evolution of an Urban Judicial System: The Philadelphia Story*, 18 AM. J. LEGAL HIST. 95 (1974).

245. *See* L. FRIEDMAN, *supra* note 114, at 325-26; J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 138-46 (1950). Of course, urban justices also were present in the earlier group and rural judges in the latter.

246. See notes 277-80 and accompanying text *infra*. *See generally* A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW (1960).

247. See sources cited notes 244-45 *supra*.

United States Supreme Court's 1872 decision in *Bradley v. Fisher.*[248] Justice Field's opinion in *Bradley* recreating the law of judicial liability received widespread acceptance in state courts and was instrumental in creating the broad rule of immunity applied in *Stump.*[249] Thus, the decision in *Bradley* and its context deserve careful examination.

Three years before the decision in *Bradley,* Field delivered the opinion of the Court in *Randall v. Brigham.*[250] In *Randall,* the plaintiff, formerly an attorney, brought suit in federal court against a justice of the Superior Court of Massachusetts, a court of general jurisdiction, for wrongfully removing him from the bar without complying with proper procedures. The circuit court directed a verdict for the defendant and the Supreme Court affirmed on the ground of judicial immunity.

After stating the facts of the case, Field announced his doctrine of immunity:

> Now, it is a general principle, applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly.[251]

Field supported this doctrine by discussing cases from *Floyd v. Barker* and *Taaffe v. Downes* through *Yates v. Lansing.*[252] In his discussion, he attempted the first justification of Kent's application of the concept of an English superior court to American courts of general jurisdiction.[253] Observing that in England superior judges are the King's delegates and should therefore be obliged to answer for their actions only to the King, Field con-

248. 80 U.S. (13 Wall.) 335 (1872).

249. Justice Davis' brief dissent, *id.* at 357, joined by Justice Clifford, had no impact on the later law.

250. 74 U.S. (7 Wall.) 523 (1868).

251. *Id.* at 535. Field stated categorically that the removal of an attorney always is a judicial act. In *Randall,* the order certainly was a judicial act because it was made in the course of normal proceedings in which the plaintiff appeared.

252. *See id.* at 536-39.

253. See notes 158-65 and accompanying text *supra.*

cluded that since judicial officers in the United States are the delegates of the people, they should be answerable only to the people through removal from office and not to private parties in civil actions.[254]

In *Bradley*, Justice Field modified his doctrinal statement by blurring the distinction between superior and inferior courts and by removing the qualification of liability for malicious acts. Bradley, a member of the District of Columbia bar, was defense attorney, and Fisher, a justice of the District of Columbia Supreme Court sitting in criminal court, was presiding judge at the trial of John H. Suratt for the murder of Abraham Lincoln. Following the discharge of the jury for failure to reach a verdict, Fisher directed that Bradley's name be stricken from the roll of attorneys of the criminal court for threatening Fisher and accosting him "in a rude and insulting manner" during the course of the trial. In a prior related action, the Supreme Court had overturned the disbarment on jurisdictional grounds,[255] and in *Bradley v. Fisher,* Bradley sought damages from Fisher for the disbarment. The Supreme Court affirmed a judgment for defendant Fisher, holding that judicial immunity was a bar to the action.[256]

Field's basic statement of the doctrine spoke only of judges of general jurisdiction: "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."[257] Thus, immunity of judges of general jurisdiction was limited by Field's distinction between excess of jurisdiction, an act outside jurisdiction but concerning a matter over which the judge or court has subject-matter jurisdiction, and absence of jurisdiction, an act for which "there is clearly no jurisdiction of the subject matter";[258] a judge would be immune for the former but not for the latter.[259] The two examples he gave were a judge of a court of "general criminal jurisdiction" holding trial in a particular offense not

254. 74 U.S. (7 Wall.) at 537. *Cf.* note 164 *supra.*

255. *Ex parte* Bradley, 74 U.S. (7 Wall.) 364 (1869).

256. Field also stated that Bradley could not establish a valid cause of action because he could not admit into evidence the order of removal that earlier was held void. 80 U.S. (13 Wall.) at 345-46. Most of the opinion, however, focuses on the judicial immunity issue.

257. *Id.* at 351.

258. *Id.* at 351-52.

259. *Id.*

made an offense by law and a probate judge trying a criminal offense. The difficulty with these examples, however, is that both a criminal court judge and a probate judge are judges of limited, inferior jurisdiction, not of general, superior jurisdiction.

The effect of this confusing portion of Field's opinion was to both limit and expand judicial immunity. The limitation arose because the distinction between excess of jurisdiction and absence of jurisdiction solidified the notion of judicial act that always had been the boundary of the immunity of superior judges. *Bradley* provided explicit authority for holding liable a superior court judge who acts in absence of jurisdiction. The expansion of liability arose because Field's analysis began the merger of the doctrinal treatment of superior and inferior judges. Although Field's language referred only to judges of superior or general jurisdiction, later courts followed the inherent logic and applied it to lower judges as well, thus expanding the immunity of those judges.[260]

A second element of Field's rule in *Bradley* was the removal of the malice qualification of the *Randall* test. In *Bradley,* superior judges were held immune without regard to their motives. Field distinguished his contrary statement in *Randall,* stating it was intended only to limit that opinion to the facts in the case and avoid unnecessary conflict with some prior opinions.[261] Here again, although Field's holding reached only superior court judges, the facts of the case and the implications of the decision were not similarly limited.

The third point to be made concerning Field's rule in *Bradley* is his elucidation, explicit and implicit, of the nature of a judicial act. His statement of the basic rule included the requirement that the act be a "judicial act." In part, this is a reflection of jurisdictional notions; an act in absence of jurisdiction is not a judicial act. Beyond that, Field suggested, a judicial act would require adherence to certain fundamental notions of judicial process. The first of these notions was the opportunity to be heard, including the right to receive notice of the grounds of the complaint and the right to present a defense. In *Bradley*, originally a contempt of court proceeding, these requisites could be waived only if they were superfluous because the contempt occurred in the presence

260. See notes 294-304 and accompanying text *infra.*
261. 80 U.S. (13 Wall.) at 350-51.

of the judge.[262] The second notion was the availability of an alternate remedy in place of personal liability of the judge, namely appeal or other procedure in error. The observance of these procedures would immunize the judge;[263] in *Stump,* of course, their absence did not remove the immunity.

Field justified his decision by precedent and policy. He cited Kent in *Yates*[264] and Lemuel Shaw in *Pratt v. Gardner,*[265] as well as a half dozen of the leading English authorities,[266] and stated with only the usual degree of exaggeration that the rule of immunity "has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."[267] Most of his opinion, though, embodied a policy discussion in favor of his rule of immunity.[268] The arguments he made were familiar ones, similar to those in both prior and subsequent cases, but the tone is different. Here is none of the dreary, formulaic recitation of policy we noted in earlier state court opinions,[269] but rather a comprehensive and persuasive presentation of the dangers of judicial liability.[270]

According to Field, every judicial proceeding leaves at least one party disappointed. In cases concerning personal liberty or character, the disappointment is particularly keen. Such disappointment breeds complaint and, if the law allowed it, the complaint quickly would extend from the judgment to the judge and his motives. If civil actions could be maintained on these complaints, many undesirable consequences would ensue. First, a defendant judge could be summoned before another, perhaps inferior, judge to explain his decision; indeed, that judge could be called to answer before a third judge, and so on. Second, the judge would feel compelled to preserve a complete record of evidence and authorities in every case to demonstrate the integrity of his decisionmaking. Third, the judge would be in apprehension of the personal consequences of every decision, undermining the judicial

262. *Id.* at 354-55.
263. *See id.* at 354.
264. *See id.* at 347.
265. *See id.* at 349 (citing Pratt v. Gardner, 56 Mass. (2 Cush.) 63 (1849)).
266. 80 U.S. (13 Wall.) 335 *passim.*
267. *Id.* at 347.
268. By implication, the opinion favored the future extension of the rule to all judges.
269. See notes 239-42 and accompanying text *supra.*
270. 80 U.S. (13 Wall.) at 347-49.

independence necessary for the effectiveness and respectability of the judicial process. Only a rule of judicial immunity could prevent this disastrous situation. Moreover, other public remedies for judicial irresponsibility, such as impeachment, would be sufficient.

The opinion in *Bradley* is classically Fieldian.[271] The scholarly commentary suggests that Field's judicial posture became more extreme in the later portion of his tenure on the Supreme Court,[272] but we can identify a significant shift even in the three years between *Randall* and *Bradley*. In his 1869 opinion, his language was more temperate, his reliance on precedent greater, his concern for the consequences of liability less; he even conceded the possibility of a malice exception. By 1872, his posture had changed, his tone had become more extreme and less judicious. Carl Swisher has suggested that Field had a conception of relativity: "Either a certain thing must happen or an alternative of a particular kind, usually one very much to be dreaded, must follow."[273] That is the case with the *Bradley* opinion. Field's parade of horribles dominated the opinion[274] and ostensibly precluded his engaging in a more careful analysis of the purposes and effects of his rule, as well as its appropriate limits.[275] Implicit in the opinion[276] is the conservatism which was to be the trademark of Field's career[277] and of the Supreme Court in this period.[278] The foremost judicial concern was the declaration of legal rules to preserve the social order by preventing precipitous changes initiated by dangerous elements in society.[279] In this context, the rule of judicial

271. *See generally* C. SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW (1930); G. WHITE, *supra* note 151, at 84-108; Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851 (1943); McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations* 61 J. AM. HIST. 970 (1975); Westin, *Stephen Field and the Headnote to* O'Neill v. Vermont, 67 YALE L.J. 363 (1958).

272. Graham, *supra* note 271, at 855-57.

273. C. SWISHER, *supra* note 271, at 202.

274. 80 U.S. (13 Wall.) at 347-49.

275. If we were to engage in crude historicism, we also might suggest that the result Field reached was derived in part from the influence of his own confrontations with judges while a practicing lawyer or his conception of the judge's role from his service as an *alcalde*, ignorant of the relevant law but applying rough justice in early California. *See* C. SWISHER, *supra* note 271, at 31-48, 62-64, 341-61.

276. See notes 206-08 and accompanying text *supra*.

277. *See* C. SWISHER, *supra* note 271, at 430; G. WHITE, *supra* note 151, at 95; Graham, *supra* note 271, at 851-52.

278. *See generally* A. PAUL, *supra* note 246; G. WHITE, *supra* note 151, at 105-08.

279. *See* A. PAUL, *supra* note 246, at 4-5; C. SWISHER, *supra* note 271, at 430.

immunity was an additional line of defense, and an especially important one. If the judges, the principal defenders of an orderly society,[280] would have themselves been subject to attack, that could have been the point at which the entire defense crumbled. The rule of immunity was therefore of considerable importance to the conservative judicial outlook.

Despite Field's concern with the effects of judicial immunity,[281] his opinion was formal in a significant sense. Although the concerns were for policy effects, the legal vehicle was a rule that Field perceived to be formally realizable.[282] The key to the rule of immunity was the excess/absence of jurisdiction distinction. For Field, the distinction was real on its face, without need to resort to the purposes of immunity in applying the distinction. This kind of analysis reached its peak in *United States v. E.C. Knight Co.*,[283] in which it was clear to the Court that "commerce" within the meaning of the Sherman Act could be distinguished from "manufacturing" without regard to the purposes to be served by the Act.[284] The choice of the rule form was appropriate for the situation and for the intellectual predisposition that shaped Field's conception of it.

D. From Bradley *to* Stump

Justice Field's opinion in *Bradley* reshaped the law in nearly every jurisdiction. Judges of superior courts or courts of general jurisdiction were, as before, immune, except for acts clearly outside the court's jurisdiction—now frequently described, in Field's terms, as acts in absence of jurisdiction—or acts that otherwise could be characterized as nonjudicial. Some courts specifically relied on *Bradley*,[285] while others simply deferred to the long history of judicial immunity,[286] but the results were almost universally the same.

In this period, however, as in the era prior to *Bradley*, the jurisdictions split on the liability of judges of inferior courts or courts of limited jurisdiction. Most courts at first continued the

280. *See* A. PAUL, *supra* note 246, at 4-5; C. SWISHER, *supra* note 271, at 430.

281. See notes 273-75 and accompanying text *supra*.

282. That is, the rule would be mechanical in its operation. See notes 380-81 and accompanying text *infra*.

283. 156 U.S. 1 (1895).

284. *Id.* at 18. See A. PAUL, *supra* note 246, at 178-82.

285. *E.g.*, Busteed v. Parsons, 54 Ala. 393, 401-02 (1875).

286. *E.g.*, O'Connell v. Mason, 132 F. 245, 246 (1st Cir. 1901).

rule that the extent of immunity of lower court judges was coincident with the limits of their jurisdiction, rendering even good-faith errors in excess of jurisdiction actionable, as Kent had stated in *Yates v. Lansing*. Thomas M. Cooley's justification for the differing treatment accorded superior and inferior judges, in his 1879 treatise on torts,[287] was particularly influential. Although Cooley supported the traditional rules, at every point he attempted to put the rules on a sound policy basis.[288] In his analysis of the apparent inconsistency between immunizing superior but not inferior judges for acts in excess of jurisdiction, he noted the differences in position, learning, and ability of different kinds of judges, especially between superior judges and justices of the peace, and concluded that far greater safeguards were necessary to control the latter, with the most important safeguard being a grant of only limited jurisdiction. Thus, a justice of the peace would best observe the spirit of the law by deciding doubtful cases against the exercise of his jurisdiction, and his failure to do so would justify the imposition of civil liability. A judge of general jurisdiction, on the other hand, being empowered to act in all matters permitted by law, would fulfill the purpose of the law more fully by exercising his jurisdiction in questionable cases and thus should not be exposed to liability for exercising questionable jurisdiction.[289]

Many courts followed Cooley's position and relied on his presentation in holding judges of limited jurisdiction immune for erroneous acts within their jurisdiction but not for acts that exceeded their jurisdiction. Many cases simply cited Cooley and some repeated his arguments,[290] while others adopted his analysis without citation.[291] For the most part, the cases merely recited the rules and arguments from the authorities without extensive original analysis,[292] although exceptions did exist.[293]

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287. T. COOLEY, A TREATISE ON THE LAW OF TORTS (1879).

288. *Id.* at 403-10. The uniqueness of Cooley's policy orientation is evident when compared with the formalistic approach of other writers. *See, e.g.*, 1 E. JAGGARD, HANDBOOK OF THE LAW OF TORTS 121-23 (1895).

289. T. COOLEY, *supra* note 287, at 419-20. Although Cooley did not note the analogy, the inspiration for this principle may have been the English presumption of jurisdiction for superior courts. See notes 59-63 and accompanying text *supra*.

290. *E.g.*, McClure v. Hill, 36 Ark. 268, 272 (1880). *Bradley* and *Yates* also were cited frequently.

291. *E.g., id.;* Mitchell v. Galen, 1 Alas. 339, 341 (1901); State v. Wolever, 127 Ind. 306, 26 N.E. 762 (1891).

292. *E.g.*, Clark v. Spicer, 6 Kan. 440 (1870); Bell v. McKinney, 63 Miss. 187 (1885).

293. *E.g.*, State v. Wolever, 127 Ind. 306, 26 N.E. 762 (1891).

In the 1880's, some jurisdictions began to depart from the *Yates-Bradley*-Cooley treatment of judges of limited jurisdiction. One of the earliest cases to challenge that treatment was *Henke v. McCord,*[294] in which the court rhetorically questioned the logic of immunizing superior judges who, from their position and presumed learning, ought to be less likely to make jurisdictional errors, while holding liable a judge inferior in position and capacity. Joel Prentiss Bishop, in his *Commentaries on the Non Contract Law,*[295] answered the question posed by the Iowa court by noting the severity of treatment typically accorded to justices of the peace and arguing that

> if judges properly expected to be the most learned can plead official exemption from their blunderings in the law, *a fortiori* those from whom less is to be expected and who receive less pay, should not be compelled to respond in damages to their mistakes honestly made, after due carefulness.[296]

In this period of great reliance on treatises,[297] Bishop's statement of the law and its rationale was influential in counteracting the effect already achieved by Cooley's contrary position. Two cases adopted Bishop's view over Cooley's and were thereafter cited frequently. The Supreme Court of Michigan, in *Brooks v. Mangan,*[298] rejected Cooley's analysis on policy grounds, without citing Cooley; the Iowa Supreme Court, answering its own question from *Henke v. McCord,* put itself in the forefront of what it perceived as a trend by holding that the liability of justices of the peace should be coextensive with that of superior judges.[299]

Courts in many jurisdictions soon followed these decisions in rejecting the distinctions among judges that had been drawn earlier. Again, some of the opinions merely repeated the arguments or rules of the principal authorities,[300] but a significant number included more sophisticated attempts at policy analysis.[301] Many

294. 55 Iowa 378, 7 N.W. 623 (1880).
295. J. BISHOP, COMMENTARIES ON THE NON CONTRACT LAW (1889).
296. *Id.* at 363-65.
297. L. FRIEDMAN, *supra* note 114, at 541-44.
298. 86 Mich. 576, 49 N.W. 633 (1891).
299. Thompson v. Jackson, 93 Iowa 376, 61 N.W. 1004 (1895).
300. *E.g.,* Case v. Bush, 93 Conn. 550, 106 A. 822 (1919); McDaniel v. Harrel, 81 Fla. 66, 87 So. 631 (1921).
301. *E.g.*, Duffin v. Summerville, 9 Ala. App. 573, 63 So. 816 (1913); Calhoun v. Little, 106 Ga. 336, 32 S.E. 86 (1898); Rush v. Buckley, 100 Me. 322, 61 A. 774 (1905); Grove v. Van Duyn, 44 N.J.L. 654 (1882).

of these courts also adopted Justice Field's analysis of the jurisdictional problem and, as was implicit in his decision,[302] applied it to all judges, thereby rendering all judges immune for acts in excess of jurisdiction but liable for acts clearly in absence of jurisdiction.[303] By the 1920's, the movement was toward equal treatment of all judicial officers, even justices of the peace.[304]

The one issue over which there remained some dispute throughout this period was liability for malicious acts. The earlier conflict between absolute immunity and liability for malicious acts continued, at least with inferior judges;[305] here the unification of the law only had the effect of increasing the tendency to immunize lower court judges even for acts motivated by malice. The conflict remained unresolved, and as late as the 1940's courts held that an act within a justice's jurisdiction could give rise to a cause of action depending on the motivation,[306] despite the rejection of that position in *Bradley* and other cases.

The period from *Bradley* to *Stump* was one of consolidation of the law of judicial liability and unification of the doctrines of different jurisdictions. The experience of the courts with this body of law illustrates several points of historical interest about the period from the middle of the nineteenth century through the early twentieth century, which saw this development in the area of judicial liability. As an initial proposition, the clear trend toward eliminating variations among jurisdictions in the law of judicial liability is consistent with what Lawrence Friedman has described as "the master trend of American legal history: the trend to create one legal culture out of many."[307] Focusing on this period, we observe the eradication of jurisdictional divergence and the consolidation of the law on this topic, as on others. This consolidation was impelled not by accident or aesthetics, but in significant part by a changing legal perspective. As scientific

302. See notes 257-60 and accompanying text *supra*.

303. *E.g.*, Calhoun v. Little, 106 Ga. 336, 32 S.E. 86 (1889).

304. 33 C.J. *Judges* § 116 (1924).

305. *Compare* Broom v. Douglas, 175 Ala. 268, 57 So. 860 (1912) (immunity); Wyatt v. Arnot, 7 Cal. App. 221, 94 P. 86 (1907) (immunity); *and* Grant v. Williams, 54 Mont. 246, 169 P. 286 (1917) (immunity) *with* Hollon v. Lily, 100 Ky. 553, 38 S.W. 878 (1897) (liability).

306. *E.g.*, Jones v. Leviton, 327 Ill. App. 309, 64 N.E.2d 195 (1945).

307. L. FRIEDMAN, *supra* note 114, at 572. Other elements of the overall trend include the tendency "to reduce legal pluralism; to broaden the base of the formal, official system of law; to increase the proportion of persons, relative to the whole population, who are consumers or objects of that law." *Id.*

thought and conceptualism gained hold, many legal thinkers concluded there could be only one correct rule of law in the area of judicial liability as in any other.[308]

Two vehicles of unification were the opinion in *Bradley* and Bishop's treatise. The Supreme Court in the late nineteenth century was regarded as a leader among American courts, the era of the great state courts having passed.[309] In commercial law, for example, the Court fulfilled its function, under *Swift v. Tyson,*[310] proclaiming an American common law that was broadly accepted by state courts.[311] The decision in *Bradley* was accepted in much the same way, as declarative of a sound rule to be followed, perhaps with some modification, even though state courts were under no legal compulsion to do so. Treatises lacked the same degree of authority as Supreme Court decisions, but they were clearly a force in the shaping of a new, more rational, law.[312] Statements of principles in treatises were helpful to judges and lawyers in cutting through the confusing mass of case law. Bishop's treatises, more opinionated than most, were widely respected.[313] As the conflict between Cooley and Bishop[314] makes obvious, however, judges had to be selective in their use of treatises, and in an area such as this, with no great conflict of social interests, the popular choice favored the one author who best demonstrated the logical inconsistency of the other and whose conclusion was most compatible with the judges' perception of their situation.[315]

E. Summary: History as Argument

Our historical review of the law of judicial liability illuminates two aspects of the current law of judicial liability and the validity of decisions such as *Stump.* The first aspect is the use of history and its particular legal expression, precedential authority, as a basis for decision. This summary section addresses that issue. The second aspect, to which the remainder of the article is

308. *See* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 11-14 (1973); G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 166-72 (1978).
309. L. FRIEDMAN, *supra* note 114, at 540.
310. 41 U.S. (16 Pet.) 1 (1842).
311. G. GILMORE, THE DEATH OF CONTRACT 96-97 (1974).
312. L. FRIEDMAN, *supra* note 114, at 541-43.
313. *Id.* at 542.
314. See notes 287-99 and accompanying text *supra.*
315. See notes 243-47 and accompanying text *supra.*

addressed, involves the judical reasoning processes employed in immunity cases, the legal form in which the results are expressed, and the relation of style and form to the substantive results.

The most important reason usually offered for a rule of judicial immunity is the weight of the past. In *Stump,* for example, the court stated that "[t]he governing principle of law is well established and is not questioned by the parties."[316] The principal authority for this proposition was the century-old precedent of *Bradley,* which likewise stated that immunity "has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."[317] Analyzing law is to a considerable extent analyzing history. Determining the law to be applied in a particular case through the analysis of precedent is a historical process. In the instance of judicial liability, however, our historical review demonstrates that statements such as those in *Stump* and *Bradley* are unworthy of the overwhelming weight they are given because they are poor history at two levels: the courts have not understood correctly the primary sources, the prior cases, and the courts have evaluated inadequately the circumstances out of which the earlier cases arose.[318] We demonstrate those errors by briefly reviewing the history we have presented and comparing it with the bald assertions in *Stump* and *Bradley.*

English law does not provide support for a broad rule of immunity except as it has been misread and misapplied by successive generations of American judges. The most ancient position of the common law was general judicial liability, not judicial immunity. At some point the technical, archaic notion of the special status of a court of record gave rise to a limited immunity for a few judges, making a judge of a court of record immune from suit for acts within the protection of the record, that is, within his jurisdiction, and for acts that the judge could not have known to be outside his jurisdiction. Largely for political reasons, Coke began the process that would expand the protection of judges, although between the time of Coke and the early nineteenth century few judicial liability cases arose. During that period, however, judges of courts not of record also were given a

316. 435 U.S. at 355.

317. 80 U.S. (13 Wall.) at 347.

318. *Cf.* Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 Sup. Ct. Rev. 119, 119-22.

limited immunity for acts within their jurisdiction.

Up to the time of *Bradley*, English law had not significantly modified the limits of this immunity. Jurisdiction remained the basis of immunity and only acts within the jurisdiction, or within the jurisdiction as it reasonably could have been determined by the judge, were protected. A very few of the highest courts were regarded as superior courts and presumed to have jurisdiction in all cases for reasons that are historical and not compelling at present. For judges of other courts, including most of the courts in England, the rule was only limited immunity; extrajurisdictional acts and acts within jurisdiction but motivated by malice were actionable. Indeed, most judges were so vulnerable that Parliament was required to intervene periodically to provide some measure of protection for lower judges subjected to civil suits.

The reception of the English law of judicial liability in the United States was given its greatest impetus by James Kent, although English precedents were also widely used by others. Kent's first contribution was the transformation of the English doctrine of superior court in attempting to apply that doctrine to the American judicial system. An English superior court was one of the few of the highest courts of the realm, but under Kent's pen the doctrine was expanded to include American courts of general jurisdiction, encompassing a far larger number of judges. In 1810, when high state courts typically held appellate and original jurisdiction, this was not that significant, but in later times when the number of courts of general trial jurisdiction grew greatly, it led to the immunization of many American judges.

Kent's second contribution was to suggest the continuation of the English rule concerning lower judges. In America, as in England, many of these judges had only limited immunity. Because of the lack of a unitary judicial system in the United States, no single style emerged, but lower judges were generally liable for wrongful extrajurisdictional acts, and were occasionally liable for malicious acts within their jurisdiction. Certainly, no broad rule of immunity existed prior to *Bradley*. The distinction drawn between high and low judges was usually formal, but was probably motivated by understandable perceptions of the judicial system and its functions.

Bradley v. Fisher was the leading precedent on judicial liability in the late nineteenth and twentieth centuries. Field's formulation of the jurisdictional issue was influential in continuing

the broad immunity for superior judges, but it also created an opening for expanded liability. His somewhat confused statements concerning the application of that formulation to judges of limited jurisdiction eventually led to the extension of immunity to such judges in many jurisdictions.

We contend that only in recent times has there been a general tendency to immunize judges from civil suit. For most of the history of the common law, judges had only a very limited immunity. It cannot be argued that there has been a growing realization of the appropriateness of immunity, for most of the expansion of immunity has been accomplished without any persuasive analysis. Judicial methodology has included various devices, such as formal application of inapplicable rules and definitions, one-sided policy analysis, and generalization from limited evidence. What remains is an unpersuasive historical argument for a broad rule of immunity. Nevertheless, that argument was a principal support for the *Stump* decision, which we now examine in more detail.

IV. Judicial Immunity Today

In the United States today, judges of general jurisdiction are, for the most part, immune from suit for their judicial acts. The term "judicial act" is broad enough to encompass any action of a judge except for certain behavior not normally expected of a judge or not colorably within the judge's jurisdiction. Judges of limited jurisdiction share this immunity, although for some of them the immunity is more closely associated with jurisdictional limits and in some states malice will remove their immunity even for jurisdictionally proper acts. The authoritative contemporary statement of the law of judicial immunity is, of course, *Stump v. Sparkman.*[319] We have described how the law arrived at this state and we have expressed our belief in the limited utility of the historical evidence for current decisionmaking. In light of this dissatisfaction, we review the reform proposals that have been made by others and engage in a policy analysis of the judicial liability problem, articulating and balancing the public and private interests implicated. In this balancing, we demonstrate that the current law in general, and *Stump* in particular, incorrectly evaluate the policy concerns, but we also argue that none of the

319. 435 U.S. 349 (1978).

proposed solutions is entirely satisfactory. To justify this position, we return to the historical materials and present a modest jurisprudential discussion of the judicial liability issue as an illustration of a greater problem. We conclude with a suggestion of our own that we find to be not entirely convincing but satisfying nevertheless.

A. Stump v. Sparkman

In *Stump,* the Supreme Court applied what it considered to be the well-established rule of judicial immunity to protect Judge Stump from liability to suit.[320] The Court, in an opinion by Justice White, used a two-pronged test, requiring that a judge perform a judicial act that is within his subject-matter jurisdiction to be immune. Justice Stewart dissented in an opinion joined by Justices Marshall and Powell, on the ground that Judge Stump's granting plaintiff's mother's petition for sterilization of plaintiff was not a judicial act.[321] Justice Powell also dissented separately, emphasizing that the lack of opportunity for appellate review of Judge Stump's order was an important factor in rendering it nonjudicial.[322]

The judicial act concept, derived from the jurisdictional limitation on immunity, has been central to judicial immunity since the beginning of limited immunity in English law.[323] In *Stump,* the Court based its discussion of the nature of a judicial act upon recent federal court decisions, which were among the first systematic judicial examinations of the concept,[324] in an attempt to clarify the nature of a judicial act and the relationship between judicial act and jurisdiction.[325]

Justice White relied principally on the definition of judicial act articulated in *McAlester v. Brown.*[326] The Fifth Circuit in

320. *Id.* at 359.

321. *Id.* at 364.

322. *Id.* at 369.

323. See notes 16-19 and accompanying text *supra.*

324. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972). *See also* Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970).

325. Caution is necessary in projecting the current definition backward, for the notion of a judicial act developed in contemporary federal cases is much broader than the definition implicit in the use of the term in the nineteenth century and earlier. See notes 169-78 and accompanying text *supra.*

326. 469 F.2d 1280 (5th Cir. 1972). Interestingly, Justice White cited in a footnote, but did not discuss, Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974). 435 U.S. at 361 n.10. In *Gregory,* the Ninth Circuit referred to the policies behind judicial immunity in

McAlester stated a four-part test for determining whether an act is judicial,[327] but Justice White condensed the four parts into two:

> The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate 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.[328]

On the first point, Justice White held that entertaining and acting on petitions, including petitions concerning the affairs of minors, is a function normally performed by a judge.[329] He rejected Justice Stewart's contention that since Indiana judges do not normally act on parents' petitions for approval of surgical treatment of their children or on petitions for sterilization, Judge Stump's act was not judicial, because the function of entertaining and deciding the petition is normally judicial even if the particular petition is atypical. On the second point, Justice White noted that only because Stump was a judge did McFarlin (plaintiff's mother), on the advice of counsel, bring her petition before him, and these expectations therefore support the construction of the act as judicial.[330] Justice Stewart in response argued that neither McFarlin's misperception of Judge Stump's power nor Stump's representation of his judicial position by approving the petition could confer immunity.[331]

The dissenting justices disagreed with the majority not only

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formulating its judicial act test, 500 F.2d at 63-65, much as Justices Stewart and Powell did in dissent in *Stump*, 435 U.S. at 368-70. Like the justices, the Ninth Circuit found the possibility of appeal to be an important component of a judicial act. 500 F.2d at 64.

327. The *McAlester* court's factors were "(1) the precise act complained of . . . 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." 469 F.2d at 1282. Justice White's restatement of this test uses the first factor and merges the second and fourth. Application of the third factor in *Stump* would have been fatal to the claim of immunity because there was no case pending before Judge Stump.

328. 435 U.S. at 362.

329. *Id.* One difficulty with this formulation is the expansion of immunity that results from considering as determinative the general category in which the judge's act falls rather than the particular action taken. On Justice White's rationale, if McFarlin had petitioned *ex parte* for the mercy killing of her daughter, Judge Stump's approval of that petition also would have been a judicial act. *Id.* at 365-67 (Stewart, J., dissenting). See notes 369-72 and accompanying text *infra*.

330. *Id.* at 362.

331. *Id.* at 367 ("A judge is not free, like a loose cannon, to inflict damage whenever he announces that he is acting in a judicial capacity.").

on the application of the judicial act test in *Stump,* but also in the delineation of that test. Justices Stewart and Powell argued that to determine what is a judicial act requires resort to the policies underlying the rule of immunity.[332] The basic policy articulated in *Pierson v. Ray*[333] was the protection of the judge's principled decisionmaking,[334] but in *Stump* there was no principled decisionmaking to protect, no litigants, no case or controversy, no weighing of the merits,[335] and, as Justice Powell emphasized, no appellate remedy to vindicate the rights of an injured party and to render a civil action against the judge unnecessary to redress a wrong done.[336]

The second prerequisite of judicial immunity in the majority's test is jurisdiction over the subject matter of the judge's actions. Justice White equated subject-matter jurisdiction with anything short of clear absence of jurisdiction in Justice Field's dichotomy between excess of jurisdiction and absence of jurisdiction.[337] Because of the sweeping statutory grant of jurisdiction to Indiana circuit court judges and the lack of a specific statutory or common-law denial of jurisdiction in such cases,[338] Justice

332. *Id.* at 368-70.

333. 386 U.S. 547 (1967).

334. *Id.* at 554.

335. *See* 435 U.S. at 368-69.

336. *Id.* at 369-70. The existence of an alternative remedy was a factor behind judicial immunity at common law. *See, e.g.,* Gault v. Wallis, 53 Ga. 675, 677 (1875); Pratt v. Gardner, 56 Mass. 63, 70 (1849); Evans v. Foster, 1 N.H. 374, 377-78 (1819); Cope v. Ramsey, 49 Tenn. 197, 200 (1870). *See also* text accompanying notes 262-63 *supra.*

337. 435 U.S. at 356-60.

338. Indiana grants circuit court judges "original exclusive jurisdiction in all cases at law and in equity whatsoever." IND. CODE § 33-4-4-3 (1976). Nonetheless, at least three reasons have been offered why Judge Stump's action was in absence of jurisdiction even given this broad jurisdictional grant. First, one commentator has suggested that Judge Stump, pursuant to Indiana statutes, was acting as a juvenile court judge, a judge of limited, not general, jurisdiction and his failure to observe proper procedures divested him of jurisdiction. Rosenberg, *supra* note 4, at 836-42. Second, the Seventh Circuit found that Judge Stump's jurisdiction was ousted by a statute authorizing sterilization of institutionalized persons under certain circumstances. Sparkman v. McFarlin, 552 F.2d 172, 174-75 (7th Cir. 1977). Third, the Seventh Circuit also found no statutory or common-law basis for the action that would bring it within the general grant of jurisdiction of all cases "at law and in equity." *Id.* The last argument applies more to situations outside this particular case and points out the fallacy of the *Stump* majority's jurisdictional standard. To be within even the most general grant of jurisdiction, an action must be one with legal precedent. The example of euthanasia is the extreme case that demonstrates the principle. The granting of a petition for euthanasia surely would have been in absence of jurisdiction, especially given the lack of observance of proper procedure, even though the statutory jurisdictional grant and subject-matter jurisdiction would have been the same as in the actual case.

White held that Judge Stump had subject-matter jurisdiction over McFarlin's petition. For courts of general jurisdiction, everything that is not expressly forbidden apparently is permitted. Further, jurisdiction and the exercise of jurisdiction are separate ideas, and therefore once it was determined that jurisdiction in this general class of cases has not been specifically denied to him, Judge Stump's "failure to comply with elementary principles of procedural due process"[339] was as irrelevant here as it was in the determination of whether his act was judicial.

Substantively, Justice White's opinion in *Stump* is illustrative of recent trends in the decisions of the Supreme Court.[340] First, the extent of potential federal interference with state judicial actions was reduced by the expansion of the immunity from section 1983 actions first granted in *Pierson*. The reduction is consistent with other decisions that generally limit federal control of state court activities, particularly through the limitation of section 1983 and federal-court jurisdiction over state court proceedings.[341] Second, the decision advanced managerial concerns by eliminating private actions against judges as potentially intrusive and disruptive of the judicial process. Other decisions advanced the same concerns in aid of the efficient administration of justice, with emphasis on "efficient," with some decrease in the protection of individual rights taken to be an acceptable cost.[342]

In process terms as well, the decision is consistent with other developments. First, Professor Tribe's description of certain leading opinions as containing "lapses of logic, disregard or distortion

339. This characterization was given to Stump's action by the Seventh Circuit. Sparkman v. McFarlin, 552 F.2d 172, 176 (7th Cir. 1977) (cited at 435 U.S. at 359).

340. A useful sampling of the literature concerning this trend includes L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978); Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976); Tushnet, *". . . And Only Wealth Will Buy You Justice"—Some Notes on the Supreme Court, 1972 Term*, 1974 WIS. L. REV. 177.

341. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976); L. TRIBE, *supra* note 340, at 144-56; *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1135 (1977). The Court has been more solicitous of judicial than administrative independence. *Compare Imbler, supra, with* Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978). *See also* Chapman v. Houston Welfare Rights Organization, 99 S. Ct. 1905 (1979). *But see* Jackson v. Virginia, 99 S. Ct. 2781 (1979).

342. *See, e.g.*, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 99 S. Ct. 2100 (1979); Stone v. Powell, 428 U.S. 465 (1976); Meachum v. Fano, 427 U.S. 215 (1976); United States v. Calandra, 414 U.S. 338 (1974). *See generally* Chase, *The Burger Court, The Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U.L. REV. 518, 589-92 (1977).

of relevant precedent, and other indications that the decisions are impelled by considerations that never quite surface in the opinions"[343] could accurately be applied to the opinion in *Stump*. Second, the majority opinion as a whole employs a formalistic approach with only the pretense of weighing competing values, a style of reasoning that has become increasingly familiar in the Court.[344]

Neither *Bradley* nor other precedents controlled the decision in *Stump*, yet the Court responded to the case as if the result were so obvious that little discussion was necessary. The majority, unlike the dissenting minority, did not feel the need to consider how the result would effectuate the policies behind judicial immunity; ukase was substituted for analysis.

B. Reform Proposals

Those who have proposed reform of the law of judicial liability sometimes have done so with specificity, but more often their proposals have included only basic principles, leaving details and application to be worked practically. In this section, we discuss three alternative liability rules; our concern is also with the essentials of the proposals.

1. The Good-Faith Approach. — In the leading contemporary English judicial liability case, *Sirros v. Moore*,[345] the Court of Appeal reversed the prior English position distinguishing superior and inferior judges and established an immunity for good faith judicial acts. Lord Denning, M.R., and Lord Justice Ormrod stated a simple version of the test, and Lord Justice Buckley stated a more complicated one that is more consistent with prior law; all three justices largely rejected the earlier basis for immunity and liability in favor of a new standard.

All three opinions examined the history of judicial liability and, of course, noted the different treatment accorded superior judges and inferior judges. Lord Denning[346] and Justice Ormrod[347]

343. L. TRIBE, *supra* note 340, at 1130.

344. See sources cited note 340 *supra*.

345. [1975] 1 Q.B. 118 (C.A.). In *Sirros*, a crown court judge was defendant in a damage action of assault and false imprisonment for allegedly wrongfully ordering the seizure and detention of an alien under order of deportation. Although the judge's order was invalid, he was held not to be liable to suit because his action was committed in good faith.

346. *Id.* at 136.

347. *Id.* at 149.

rejected the modern validity of the distinction; Justice Buckley stated that the same liability principle should be applicable to both, but that its application may vary in different situations because of jurisdictional variations.[348] Lord Denning's statement was forthright:

> If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank . . . . So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction — in fact or in law — but so long as he honestly believes it to be within his jurisdiction, he should not be liable . . . . He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind.[349]

Although this statement includes reference to jurisdiction, clearly the motive of the judge, the attempt to honestly fulfill judicial responsibilities, is both the reason and the standard for immunity. This standard is different from the basic immunity rule of *Stump* in the attention given by the standard to the subjective circumstances of the judge's act.

2. The Malice Approach. — An approach similar to the good-faith test is a rule of general immunity except for acts committed with malice. We treat this separately from the good-faith approach because it has been one of the reforms most frequently suggested in the literature.[350]

This standard would render a judge immune from liability except for acts committed with malice. For this purpose, malice is defined to include not only a conscious purpose to injure, but also reckless disregard for proper action, reflecting the definition advanced in *New York Times v. Sullivan.*[351] The emphasis on the bad faith of the judge is the converse of the good-faith approach, but the two standards are essentially harmonious. The purpose of the malice standard is to protect good-faith decisionmaking by

348. *Id.* at 139.

349. *Id.* at 136. Justice Buckley's modification of this standard would remove the immunity when the judge acts in good faith but lacks jurisdiction because of negligence concerning the jurisdictional facts or because of a mistake of law.

350. *See* Kates, *supra* note 4, at 623-24; *Immunity of Judges, supra* note 4, at 767; *Liability of Judicial Officers, supra* note 4, at 335-37.

351. 376 U.S. 254 (1964). See sources cited note 350 *supra.*

sanctioning only behavior outside the requirements of the judicial office because of ill-will or of gross neglect. The *New York Times* malice test may be somewhat broader than the malice standard used at common law, although some states used a doctrine of constructive malice for extremely injudicious behavior that may amount to the same thing.[352]

3. The Judicial-Process Approach. — Justices Stewart and Powell, in their dissents in *Stump,*[353] presented a critique of Justice White's opinion that contained an alternative rule of judicial immunity. That rule takes the nature of the act that is the subject of the litigation and its appealability as the factors that set the limits of judicial immunity. Together, these two factors emphasize the importance of observing accepted judicial procedures as the basis of immunity.

The essence of the judicial process approach is that a judge will be immune from suit for any action taken consistent with the procedural standards normally expected of judges.[354] The first procedural requisite is jurisdiction. Justices Stewart and Powell did not explore this concept in detail, but it is apparent that their view is not a technical one. Instead, jurisdiction is satisfied if the act taken can be said to be one "normally performed by a judge." The words are Justice White's,[355] but Justice Stewart's interpretation of them is different from Justice White's. For Justice Stewart, the phrase embodies an imprecise notion that the act is within a range of authority considered appropriate for a judge by traditional practice and general agreement.[356]

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352. See notes 194-95 and accompanying text *supra.*

353. 435 U.S. at 364-70.

354. What is left undeveloped in the opinions of Justices Stewart and Powell is the rule of liability to be applied when the court determines the absence of the factors that would cause immunity to attach. In *Stump,* the normal liability rules of 42 U.S.C. § 1983 (1976) presumably would apply. In cases brought in state courts as common-law damage actions, general tort principles would apply and therefore either intent, recklessness, or probably even negligence would render the judge liable to damages. To some extent, therefore, the judicial-process approach is different from the good-faith and malice approaches because, strictly speaking, it contains only a rule of immunity and not rules of liability as well. See note 1 and accompanying text *supra.*

355. 435 U.S. at 362.

356. *Id.* at 365-67. In *Stump,* for example, Justice White considered Judge Stump's action "normal" as a decision on a petition, and particularly on a petition regarding a minor not specifically excluded by the Indiana general grant of jurisdiction. Justice Stewart was more concerned with the specific action, an order for sterilization. Because he regarded that action so exceptional that it was outside the scope of accepted conduct, he would have denied immunity.

To develop the other standards expected of judges, Justice Stewart considered "the factors that support immunity from liability for the performance of [a judicial] act."[357] Relying on the summary of those factors in *Pierson v. Ray*,[358] he enumerated the presence of litigants in an actual case, principled decisionmaking by the judge, and the possibility of appellate review. Judges are immunized to ensure their ability to engage in independent decisionmaking and, in an adversary system, those features are essential to that function.[359] Justice Powell emphasized the last factor in his separate dissent, stating that a foundation of the judicial immunity doctrine as expressed in *Bradley* and other cases is that the vindication of private rights in a civil action is unnecessary because of other avenues available to vindicate those rights.[360]

The judicial-process approach differs from the good-faith and malice approaches in its emphasis on objective characteristics of the judge's action and it differs from the rule in *Stump* in its emphasis on more precise procedural protections as the test for judicial immunity. Those emphases make it an attractive alternative to the other doctrines. To explain our preference for it, we now turn to the policy analysis of the judicial liability issue.

C. *The Policy Pictures*

The choice among the present immunity doctrine and any of the three alternatives should be made by weighing the relative advantages and disadvantages of each. In this section, we begin the policy analysis of the judicial liability problem by presenting the relevant policy concerns. At the risk of repeating ourselves, we first emphasize two arguments for a rule of judicial immunity that probably would be generally regarded as spurious. The first such argument is historical precedent. As has been previously stated, until modern times, judicial immunity was a limited doctrine. In any case, the past does not strike us as a very persuasive point of argument in this case. A rule of judicial immunity does not appear to be so central to our system of justice that its altera-

357. *Id.* at 365-69.

358. 386 U.S. 547, 554 (1967).

359. 435 U.S. at 368-69. In *Stump*, since no parties were adverse, no issue was in dispute, the judge did not present "even the pretext of principled decisionmaking," and his decision negated the possibility of appeal, that decision was not a judicial act and therefore provided no immunity.

360. *Id.* at 369-70. In *Stump*, the judge's action foreclosed any other method of review. Thus, the basic assumption of immunity was undercut.

tion would be a most significant step, nor is it the type of legal rule concerning which significant public or private expectations have arisen; therefore, changing the rule would not disappoint extant expectations. Judges, those most affected, probably have a general idea of their immunity from suit[361] and alteration of the rule would disappoint their expectations to some extent, but the effects of anything short of wholesale revision would not inevitably be disastrous.

The second such argument is the necessity of extending judicial immunity to resolve the inconsistent treatment of different judges. Throughout most of history, superior court judges had a broader immunity than inferior court judges, but by the early twentieth century, that inconsistency was removed and all judges were treated similarly. As was much debated at the time, the inconsistency may have been indefensible, but that does not explain, as a matter of logic or policy, why the immunity of superior judges was extended to inferior judges and not the liability of inferior judges extended to superior judges. Only on historical grounds can we begin to understand why the general rule today is immunity, not liability, and those grounds are not persuasive in the final analysis.

We must extract the better reasons advanced in support of the doctrine of judicial immunity from a variety of sources, judicial and scholarly. It is insufficient simply to refute the arguments of Justice White in *Stump* or Justice Field in *Bradley*. Instead, the entire body of law and commentary on judicial liability in England and America is our source. Our investigation leads to the development of a view of the judicial system that provides the context for policy discussion of judicial liability. Two pictures together comprise the argument for judicial immunity and against judicial liability:[362] a picture of the present judicial system operating under a rule of judicial immunity that protects all judicial acts broadly defined, and a scenario of how the judicial system would operate under a doctrine of judicial liability. Those dissatisfied with judicial immunity and favoring some form of limited liability view the situation differently. Their perception

361. This general expectation without reference to a particular knowledge of the law supports the idea presented earlier that the law embodies an existing reality. See notes 206-08 and accompanying text *supra*.

362. Of course, "liability" and "immunity" are used here not as absolutes, but as degrees of liability. See note 1 *supra*.

of the existing situation is less appealing than that held by those favoring immunity, and the scenario of limited immunity consequently less horrifying. We now present those conflicting views before turning to a criticism of this entire approach to the problem.[363]

1. The Case for Judicial Immunity. — Proponents of judicial immunity view the judicial system as it now operates as one in which most judges act reasonably, though not always correctly, most of the time. There are no widespread problems of judicial incompetence, vindictiveness, misfeasance, malfeasance, or nonfeasance. Judicial errors can be corrected by appellate review and the few cases of misconduct or incompetence that do occur can be effectively remedied either by public procedures such as impeachment, or, in the most extraordinary cases, by private action within one of the few exceptions to the doctrine of immunity.

Contrasted to this placid picture of a system in equilibrium is the scenario of what would occur if judges were liable to civil suit. In this view, nearly every lawsuit leaves at least one of the parties dissatisfied with the result, and the disappointed party or parties will attribute the problem not to the lack of merit in the cause but to some malfunction in the process itself, with the most visible source of this putative malfunction being the judge. The party's disappointment will cause a search for judicial wrongdoing and, in the party's frequently vengeful state, some wrongdoing will be perceived. Either error, incompetence, bias, or malice will be attributed to the judge by the party, as the situation allows and as the cause of action against the judge requires. The result of the party's perception of injury frequently will be a civil action against the judge. The number of these actions will be enormous since at least one party to nearly every legal proceeding will want to bring such an action. Further, the total will increase geometrically as the disgruntled party proceeds through the system. If an action against the first judge is unsuccessful, the failure will be attributed to a wrong committed by the second judge, against whom an action also may be brought, and so on *ad*

363. As our presentation in this section is synthetic we do not cite to authority at each point. The elements of the pictures that comprise the case for judicial immunity are drawn primarily from the judicial opinions cited throughout as favoring immunity of one sort or another. Other statements of the policy favoring immunity are included in the contemporary scholarly literature, which is also the principal source for the arguments against judicial immunity. See note 4 *supra*. The pictures presented are somewhat exaggerated but fairly present the ideal types from which the arguments proceed.

infinitum. These suits cannot be screened out by the system, for any doctrine of immunity but the most broad will require an inquiry into particular facts before the validity of an action against a judge can be determined.

Thus, the systemic effects of a rule of liability, in this view, would be drastic. The multitude of actions brought against judges would clog the courts, impeding the flow of other judicial business. The disruption would be greater than that caused by a similarly sized body of litigation of some other kind because each case would involve two judges and not one, the presiding judge and the defendant, who would be diverted from normal judicial duties by the necessity of reconstructing the decisional processes at the time of the contested act, giving testimony, conferring with counsel, and otherwise presenting a defense. These burdens would consume scarce resources, including both judicial time and state funds, particularly if the government indemnifies the judge for damages recovered.

The effects on judges would be just as disastrous according to the proponents of this view. Judicial liability would endanger the independent, fearless, principled decisionmaking in which judges must engage. Judges would be less free to make decisions if they were in fear of having their motives misconstrued in subsequent actions. Weighing into each judicial decision would be not only the merits of a case, but also the probability that the losing party would bring suit and the judge's position if that contingency materialized. Judges would be motivated to practice defensive decisionmaking, taking extra precautions in every matter solely for the purpose of building a record to vindicate their decisions upon later scrutiny. Furthermore, these fears would extend to prospective judges and would discourage lawyers from seeking or accepting judicial appointments to avoid awkward, tiresome, and embarrassing public examination of their every act.

The final detrimental impact of a system of judicial liability would be the degradation of the judiciary in the eyes of the public. A significant aspect of the legitimacy of the judicial office and the effectiveness of the judicial system results from the esteem in which the citizenry holds the judiciary. Subjecting judges to many vexatious suits and examining their acts both in public and in the public press would certainly cause a loss of stature. This is especially true when, as a result of the vagaries of the jury system or the inevitability of occasional error, judges were forced to pay damages, a form of public penance for wrongdoing as well

as compensation to an injured plaintiff.

2. The Case for Judicial Liability. — Given the current state of the law, the case for judicial liability takes the form of a critique of the present situation and a refutation of the liability scenario drawn by the advocates of continued immunity. The alternative view of the present state of affairs assumes that most judges act properly most of the time, and therefore judicial liability will not be an everyday threat. At present, however, when error or wrongdoing does occur, mechanisms other than private actions against a judge are inadequate remedies. Appellate review often comes too late to redress the wrong done a party, providing little or no compensation for the harm done, and, to the extent that liability is intended to punish the judge and to deter future wrongful conduct, appellate review is ineffective. Further, under the judicial immunity doctrine defined in *Stump*, appellate review will be completely unavailable in some cases. Public forms of sanction, such as censure or removal from office, by contrast, serve the retributive function but provide no compensation for the injured party, and these sanctions are notoriously cumbersome in application and are effective only in rare cases.

On the other hand, in the reformers' view, the world under a system of liability would not be as bad as envisioned by those favoring immunity. Litigants will be disappointed, of course, but only in a relatively few cases will that disappointment breed vindictiveness or accusations of bias, malice, or other wrongdoing against judges. Litigants are normal people, sometimes rational, sometimes not, but no more prone to unreasonable conduct than the rest of humanity. Even when a litigant's emotions are aroused and the judge becomes the target of those emotions, a civil action will not ensue as a matter of course because the economic costs of such a suit will be significant, requiring a substantial outlay of funds by the party, or, if brought under a contingent fee arrangement, of opportunity cost by counsel. At this point, the limits of the particular rule of liability adopted become crucial, determining the probability of success and the potential benefit. Frivolous actions will be rare because of these costs and because of the likely unwillingness of attorneys to participate in fruitless causes, especially those that alienate judges and colleagues at the bar. Finally, the hypothetical situation of an action being brought against a judge and then another action against the judge who

tries that action, and so forth, is unlikely to occur with any frequency.[364]

Whatever costs will be incurred by the system are the necessary expenses of vindicating the party's rights and providing an effective penalty for judicial misconduct. In the process, independent decisionmaking will not be sacrificed entirely to judicial liability. The argument that judges will be more hesitant because of the threat of suit ignores the realities of the situation and of the judicial character. In most cases, the threat of suit would come equally from both parties and thus no particular bias should be present. Even when a particularly potent threat is present, the moral fibre of most judges will be sufficiently strong to resist the implicit pressure. Judges are subjected to many different pressures, both in particular cases and in general, and are quite able to resist those pressures as they affect specific decisions. Even to the extent that judges are unable to resist, the threat of litigation will not be the greatest influence to which they are subject. Most judges are subject to the basest of influences—election or political appointment. Compared to the weight of these processes, the hypothetical influence of civil action will be minimal. Moreover, to the extent threatened litigation induces caution in the judge, it may be beneficial. The costs of the administration of justice may increase, but the price will not be too high if it ensures a meticulous concern for the rights of parties and a check on judicial misconduct.

Nor, by this view, will a degradation of the judiciary in the eyes of the public necessarily flow from a rule of liability. Recovery of damages from judicial tortfeasors may be degrading to them, but only if an association is made between them and all judges will the esteem of the entire judiciary be lowered. If only a few such cases arise, the association will not be strong and the degradation may be no greater than that arising from public awareness of unpunished judicial wrongdoing. Indeed, the legal process may be dignified by the public's knowledge that the judicial system can punish its own misfits and correct its own errors.

D. The Policy Core

The policies and interests raised by the alternative views are

364. Unlikely, however, is not the same as impossible. For an account of just such a case, see Foster v. Bork, 425 F. Supp. 1318 (D.D.C. 1977).

numerous and overlapping. As presented in judicial opinions and scholarly commentaries, the issues are complicated and almost unmanageable. The policy debate, however, may be reduced to disagreement on a few basic points, a policy core common to every examination of this problem, which can be the vehicle for deciding between the various alternatives.

There are three elements in the policy core of the judicial liability problem: first, the magnitude of the harm done to victims of judicial wrongdoing; second, the costs of enforcing a liability rule; and third, the impact of the liability rule on the execution of the function of the judicial process.[365] Each of these three elements entails some of the basic issues in the judicial liability debate, and together they provide the core on which the policy debate will be settled, if settlement is possible. The weight of the first factor, the magnitude of the harm done to parties by judges, depends on the seriousness of the problem, that is, the number of instances of judicial misconduct and the amount of injury caused in those instances, and the effectiveness of other forms of review, such as appeal and removal from office, in preventing and redressing harm and punishing judicial wrongdoing. The second factor, the costs of enforcing a particular liability rule, comprises the number of private actions brought and their effects, the degree of distortion of the decisionmaking process caused by the threat of liability, and the difficulty of the factfinding process imposed by the liability rule. The third factor, the impact of the liability rule on the judicial process, concerns the products of the process, public and private dispute resolution, and justice.[366]

Thus, the tests for any rule of judicial liability, present or proposed, are whether it increases or decreases the harm done to persons by judicial misbehavior, the cost of reducing that harm, and the quantum of justice produced by the judicial process. Generally, decreasing the first two elements and increasing the third would be socially useful; increasing the first two and decreasing the third would be harmful. Any variation from those two possibilities necessitates evaluation of the relative costs and

365. The statement of the core elements is adapted from Baxter, *Enterprise Liability, Public and Private,* 42 LAW & CONTEMP. PROBS. 45 (1978). The issue of Law and Contemporary Problems in which the Baxter article appears is devoted to the topic of official immunity.

366. Dispute resolution is involved in this issue only to the extent that the costs on the system make the dispute resolution process less effective; the central part of the third factor is the justice done by the execution of a liability rule.

benefits of each of the factors.[367] In that case, the elements of the policy core are the focus for disagreement between supporters of immunity and proponents of a more expanded liability. The conflicts are conflicts of factual prediction and of value. We now discuss the rule in *Stump* and the reform proposals in an attempt to resolve these conflicts.

E. The Policy Analysis

The choice on policy grounds among reform proposals, or between any reform and the *status quo,* is made by measuring each liability standard against the core policies. Presumably, the result should be a conclusion, satisfactory to those who hold the two differing views of the legal system previously described, concerning the liability standard that best balances the core policies and achieves the most socially advantageous, that is, the most just, result. Practically, however, that is not the result. Although we can suggest the direction of influence on the first two elements for each of the alternative liability rules, the degree of change is not subject to empirical verification. The third element creates even greater difficulty because it is value-based and therefore incapable of rational determination.

1. Magnitude of Harm. — The first issue in the policy core is the extent to which reform of the rule in *Stump* would decrease the harm done to parties by judicial misconduct. Here, the two camps disagree on the starting point, namely how much harm is done to parties under the current rule. That disagreement, of course, influences their beliefs concerning the extent to which any improvement is necessary or possible, but both sides do agree on the direction of change under each of the reform proposals. Both perceive that a wider liability rule would induce more caution in judges and consequently prevent some misbehavior that otherwise would occur. Indeed, one of the principal arguments against liability is that it would create excessive caution and thus interfere with independent decisionmaking.

The deterrent effect of a liability rule will vary with the type of behavior addressed. No rule of liability can deter irrational conduct, but most acts complained of seem to be not wholly irrational, but either motivated by prejudice, bias, anger, or ill-will, or the result of inattention, neglect of duty, or incompetence.

367. Baxter, *supra* note 365, at 45-46.

The fear of liability may influence the judge to exercise restraint with the first group and spur a judge to take more care in the second, thus having a positive effect in both cases.

The good-faith approach and the malice approach are similar in conception, though different in focus, and will have similar effects on judicial wrongdoing. They will have some deterrent effect on judges who otherwise would act maliciously. Focusing on the judge's state of mind as manifested by his behavior, these approaches will require some subterfuge by judges who attempt to deliberately violate the rights of parties if liability is to be avoided; in some cases, subterfuge is not likely because of the lack of a proper judicial temperament, the source of the problem in the first place, and there will be an imposition of liability that remedies the particular harm and has some deterrent effect on judicial behavior in general. A major deterrent effect would be provided by the *New York Times* variation on actual malice or an equivalent objective or procedural formulation of good faith. A standard that provides immunity only if certain safeguards are met will channel potentially aberrant behavior into desired forms and a "reckless disregard" test will influence some judges to take sufficient precautions to avoid running afoul of the test. This presumably will improve the quality of decisionmaking and reduce the incidence of abuse.

The judicial-process approach contains procedural and substantive safeguards, with each having differing impacts on the prevention of improper judicial acts. If the procedural lesson is learned, instances of harm due to neglect will decrease significantly. Channelling judicial activity into accepted paths provides both a lower likelihood of wrongful injuries to parties and a greater opportunity to correct the wrongs. This approach is especially useful in preventing what may be the worst situation, when, as in *Stump*, the judge's act has irreversible consequences yet is hidden from review. The effect of the substantive aspect of the judicial-process approach is less certain. The notion of liability for a function "not normally performed by a judge" or lacking "principled decisionmaking" is a more general threat. Because it is more general, it may influence a broader range of situations, but because it is less specific, its impact may be less keen. Much would depend on the content given to the terms in practice, demonstrating the willingness of judges to impose liability on each other.

2. Costs of Enforcing Sanctions. — The second element of the policy core is the cost of a rule of liability. The key here is the ease with which the proof process can implement the liability standard. The scope of the liability standard will determine the likelihood of success of a suit and the ease of disposition of unwarranted suits, which will be the principal determinants of the number of suits brought and the systemic costs of those suits. A secondary cost is the loss of judicial independence from an expanded rule of liability.

The rule in *Stump,* if construed as broadly as apparently intended by the majority, minimizes the costs to the system by allowing an early disposition of most suits. Despite the indeterminacy of the terms of the rule, the thrust of the rule is to make success unlikely in any suit against a judge. The greatest fear of advocates of such a broad rule of immunity is that anything less will open the floodgates to a stream of frivolous litigation that will not be possible to check.

As a general principle, the wider and the more uncertain a liability standard is, the greater the costs of avoiding spurious or unmeritorious claims. Anything less than a nearly complete rule of immunity, as in *Stump,* carries the potential for litigation that will proceed through the system and require elaborate factfinding and judicial participation before decision. Thus, the costs of the good-faith and malice tests will be great. The attempt to prove actual malice is a quagmire that inevitably will involve expenditure of enormous judicial resources, and even the type of second-order inquiry into the judge's ability to explain a departure from normal processes, as required by the *New York Times* standard, seldom will be capable of decision prior to proof. The costs of either test will therefore be great.

Stump is useful as an example. One of the striking features of both reported decisions in *Stump* is that Judge Stump himself remains an unknown quantity. The record tells us nothing about him beyond the formal characteristics of his position and the action he took. Imagine *Stump* litigated under a good-faith or malice standard. The necessary inquiry would include evidence taken in discovery and at trial on his assumption of jurisdiction, his failure to give notice to Linda or appoint a guardian *pendente lite,* his failure to enter the case in the court record, and so forth. It is hard to imagine how the case could have been concluded without a full trial.

The judicial-process approach, strictly construed, because it

has the most narrow and most concrete liability standard, will be a more effective check on vexatious but unmeritorious litigation. The factual claims of plaintiffs may be speculative, but seldom will they be knowingly untrue; even false claims of a failure to adhere to procedural safeguards can be disposed of at an early stage of litigation with little factfinding by any of a number of pretrial motions. The cost of a limited exception to the immunity principle for cases such as *Stump* would therefore not be great. The costs increase with any extension of liability beyond mere failure to provide procedural due process. Even Justice Stewart's extension to "functions not normally performed by a judge" and "lack of principled decisionmaking" makes much more difficult the distinction of spurious claims from meritorious ones because of legal and factual intricacies.

The second cost of a rule of liability is the loss of judicial independence from fear of civil suit and civil liability. Here, the direction of variation with particular liability standards is clear. The disagreement of proponents and opponents of liability on this point is evident from the presentation of the policy pictures; the cost, however great or small, again will increase directly with the exposure to liability and inversely with the certainty of the liability test.

3. Effect on Justice. — The third element of the policy core is the effect of the liability standard on the quantum of justice in society. This has been characterized as "the insurmountable barrier to a satisfactory analysis of the problem because of the impossibility of achieving agreement on the definition of justice and the costs that should be incurred to attain it."[368] We adopt that characterization; the intractable nature of this element is symptomatic of a fundamental contradiction in the legal process and, in turn, the existence of that contradiction helps explain the decisional patterns demonstrated in earlier judicial liability cases. From this point forward then, we build our argument to its resolution, concluding the policy analysis of the judicial liability problem and discussing policy argumentation in the legal system generally and then re-examining the way judges have responded to the judicial liability problem. Finally, the results of that examination will be linked to broader thoughts on the legal system.

A useful way of illustrating the dilemma arising from the

368. *Id.* at 46.

third element of the policy core is by presenting individual cases and analyzing them under that element. We choose four recent cases, the facts somewhat simplified and stylized, which are largely representative of the range of judicial liability cases. The cases are: *Gregory v. Thompson,*[369] in which a judge physically assaulted a visitor to his courtroom by forcibly removing him; *Zarcone v. Perry,*[370] in which a judge who had been served "putrid" coffee by a vendor ordered the vendor seized and brought before him in handcuffs to be harangued by the judge; *Stump v. Sparkman,*[371] in which a judge, acting on a mother's petition, ordered the sterilization of a minor without notice, hearing, or opportunity to appeal; and *Sirros v. Moore,*[372] in which a judge ordered the arrest and detention of an alien, an act that would have been lawful if he had asserted jurisdiction over the underlying matter regarding which the alien first came before him, but which was unlawful because he stated that he lacked jurisdiction over that matter.

Consider first how these cases would be decided under each of the possible liability rules. Implicit in each decision is a policy judgment that justice is increased by immunization or the imposition of liability considering the harm done to the parties and the cost of imposing liability under each rule. On those grounds, *Gregory* and *Sirros* are the cases that demarcate the range of agreement of those who have previously addressed the issue. The tests of the majority in *Stump* and the judicial-process, good-faith, and malice approaches would render liable the defendant in *Gregory,* but not the judge in *Sirros. Gregory* fails under each test because assault is not a judicial act under any accepted construction and also fails under the good-faith and malice tests because of the judge's state of mind. *Sirros,* on the other hand, is a case in which immunity would apply because it was a judicial act within the general jurisdiction of the court under the *Stump* test, because the act was one normally performed by a judge and was discharged in accordance with accepted procedures under the judicial process test, and because the state of mind of the judge was acceptable under the good-faith and malice approaches.

Disputes over the third element of the policy core arise in

369. 500 F.2d 59 (9th Cir. 1974).
370. 572 F.2d 52 (2d Cir. 1977).
371. 435 U.S. 349 (1978).
372. [1975] 1 Q.B. 118 (C.A.).

those cases within the range set by *Gregory* and *Sirros*. *Zarcone* at first might seem like a clear case of liability under the judicial-process, good-faith, and malice approaches; more interesting, however, is the treatment of *Zarcone* under the rule in *Stump*. If we alter the facts in *Zarcone* to make Judge Perry a judge of general jurisdiction with a grant of jurisdiction equivalent to that of Judge Stump,[373] his action in summoning and abusing Zarcone was arguably within his jurisdiction and was a function normally performed by a judge—punishment of a contempt. Although the incident did not arise out of a pending case and was never entered on the docket, those factors are not determinative since they were not present in *Stump*. Thus, Judge Perry, who was removed from the bench for his conduct,[374] might not be liable to a civil action for the same conduct.

We have an intuitive reaction that this argument is unsound, and that Judge Perry should be liable. Of course, intuitive reactions are not to be trusted as predictive devices; we would have had the same reaction to *Stump*. But we suspect that others would share our reaction, including the defenders, and perhaps even the authors, of the rule in *Stump*. The point of the present discussion is to explore that reaction. A decision for liability in *Zarcone*, taking *Stump* as the controlling authority, certainly need not be justified solely on intuitive grounds. Lawyerly distinctions could be made in delineating the ambit of either "jurisdiction" or "judicial act." The reality of the distinction would not be based on those grounds, but rather on the reaction that Judge Stump's conduct was sufficiently judicial that he ought to be protected, while Judge Perry's conduct was so unjudicial that he ought to be liable.

The point may be made more clearly this way. What we are discussing is a tort action. We use Prosser's statement of the general nature of torts as a starting point:

> [L]iability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interest of others . . . . The tort-feasor usually is held liable because he has acted with

373. Judge Perry was a county district court judge sitting in traffic court. 581 F.2d at 1040.

374. *In re* Perry, 53 A.D.2d 882, 385 N.Y.S.2d 589, *appeal dismissed*, 40 N.Y.2d 1079, 360 N.E.2d 964, 392 N.Y.S.2d 1029 (1976).

an unreasonable intention, or because he has departed from a reasonable standard of care.[375]

The intuitive judgment suggested above is that Judge Perry's conduct was socially unreasonable, but that judgment is not necessarily arrived at by a careful weighing of the nature of the judicial process and the immunity of judges derived from that process. For Justice White in *Stump,* a judge's action is unreasonable only when the judge departs from a standard of care defined by jurisdiction, most broadly construed, and the concept of functions normally performed by a judge, equally broadly construed. In our altered version of *Zarcone,* then, liability will attach only if the act is not within Judge Perry's jurisdiction. Because of the vagueness of Justice White's application of the jurisdictional standard, that determination can be made in only two ways: either Judge Perry is immune because "all cases in law and equity" means all cases, no matter how irregular or implausible, or he is liable because he failed to adhere to the standard of care and exceeded our conception of acceptable conduct, for reasons that cannot be precisely identified or supported and that certainly do not follow by entailment from either the jurisdictional statute or the statement of the rule of immunity.

To complete the scheme, each of the three alternative liability standards has a different definition of reasonableness and, consequently, of the justice of sanctioning conduct defined as unreasonable. The good-faith approach ostensibly relies on the judge's intention, a reasonable intention being a *bona fide* effort to act judicially, that is, independently, carefully, and without bias, but if its authors were required to further articulate the test they might also draw on the malice approach, which is concerned not only with the intention of the judge, but also with his adherence to a substantive and procedural standard of care defined in *New York Times* as something short of reckless disregard. The procedural aspect of the judicial process approach defines the standard of care as requiring adherence to traditional procedural safeguards, but the substantive aspect of that approach relies on the same kind of vague determination of appropriateness as the *Stump* test.

Considering *Stump* in this context, Judge Stump acted sufficiently within his authority and the ambit of normal judicial

375. W. PROSSER, *supra* note 5, at 6.

action to bring him within the *Stump* immunity rule. Under the judicial-process approach, however, Judge Stump's action was unreasonable because of the irregularity of proceeding and the impossibility of appeal. On the third policy ground, justice, how is a choice to be made between these two views of *Stump*? The answer is more than unknown, it is imponderable. Much recent literature has argued that a basic tenet of modern social theory, including modern legal theory, is that values are subjective and arbitrary.[376] Values are subjective because they are solely a matter of individual choice and they are arbitrary because once the choice is made little is left to be said. Values are not subject to rational debate or discussion and one person can rarely persuade another of the rightness of certain values because of the irreconcilable antinomy of reason and value. Accepting this antinomy, the impossibility of an unequivocal response to the question posed becomes clear. The choice between a doctrine that embodies a goal of maximum judicial autonomy and one that expresses the value of conformity to established procedures is subjective and therefore indeterminate.

We can further complicate the matter by considering *Stump* under the good-faith and malice approaches. Both tests require some inquiry into the judge's motivation, but the case as reported, being unconcerned with that issue, provides insufficient facts for making that inquiry now. Assuming the facts were available, we would ask several questions including whether Judge Stump thought he could exercise his powers as he did, whether he made any inquiry into the applicable law, and whether he was motivated by any prejudices. These are factual matters on which we presumably could arrive at a generally acceptable conclusion. If good faith was lacking, or reckless disregard was evident, then these two tests would impose liability. The decision to do so involves value choices at two levels: first, that liability would be just as a general matter and, second, that liability would be just given the costs imposed on the legal system. Even if a value could be placed on the third element of the policy core, the resolution of the policy formula requires a weighing of the costs of a liability rule against the benefits. Weighing implies a scale, an objective measure, but the choice among competing values is itself reflective of more basic values and is therefore subjective and arbitrary.

376. *See* R. UNGER, *supra* note 208, at 67-81, 119-21; *Form and Substance, supra* note 208, at 1767-71; *Legal Formality, supra* note 208, at 363.

The experiences of those involved in the resolution of this issue are sufficiently related that their values, though subjective, may be commonly held. Each decisionmaker values compensating injured parties, sanctioning wrongdoers, and maintaining the efficiency of the legal system, but when those common values conflict, as in the judicial liability context, no independent means of resolving the conflict is available.[377] Accordingly, Justice White's resolution of the conflict in *Stump* is valid on its own terms as are the resolutions achieved by the judicial-process, good-faith and malice approaches.

Values are subjective and arbitrary, but because values are products of experience, common experiences often will produce common values.[378] We can all therefore agree that the value of judicial independence is not much involved in *Gregory,* but it certainly is in *Sirros.* In the intermediate cases, we are torn between conflicting values. Even though our argument to this point suggests that we are unwilling to assert that our conclusions are definitive, we argue that *Stump* was wrongly decided. Anyone who examines the cases is likely to agree on *Gregory* and *Sirros,* and it is our opinion that most of the legal community and society at large would agree on *Stump* as well. In *Stump,* we can assign approximate weights to each element of the policy core and most observers would agree that the small added cost of the second element is outweighed by the advantages of liability in the first and third elements. It is our belief that the decision in *Stump* should be rejected as too protective of judicial prerogative because it violates a basic tenet of the legal process — the right of review — when there would be little cost to the legal system from imposing liability.

Thus, Justice Powell's emphasis on the importance of appealability is persuasive to us. The majority's conclusion, whatever the strengths or weaknesses of the process that produced it, is simply undesirable. In this assertion we do not mean to propose a universal theory of judging that requires adherence to widely held values. We do not conclude that *Stump* was wrong because it was out of step with generally held beliefs or that the proper pattern for a court is to express values and then measure the response to determine if the values are widely held.[379] We simply

377. *Cf.* R. UNGER, *supra* note 208, at 100-03.
378. *Cf.* E. CAHN, THE SENSE OF INJUSTICE 22-27 (Midland Book ed. 1974).
379. *But cf.* G. WHITE, *supra* note 308, at 158-61.

state that the alternative result would have been preferable, in our opinion. That opinion is shaped by our view that human dignity and the redress of wrongful injury, especially in so serious a case, are of higher value than what we perceive to be marginal costs to the legal system of contrary decisions in cases such as *Stump*.

4. Summary. — To summarize, what we have attempted to do is to resolve a typical doctrinal question by using a standard policy analysis. Having identified the interests implicated, however, we find that conflicts among them could not be resolved. The magnitude of the harm caused by judicial wrongdoing is a matter of fact on which there is no agreement. The systemic costs of any liability standard are also factual issues, but are not subject to prediction with any degree of certainty. Finally, the moral desirability of any liability rule is not capable of rational resolution. Individually, therefore, the elements of the policy core defy resolution of the judicial liability problem. Any attempt at balancing the various elements is similarly fruitless. On the particular facts in *Stump,* however, a resolution of sorts is possible, and that resolution suggests a partial solution to the larger problem as well. Application of the procedural aspect of the judicial-process approach to the judicial immunity question would be consonant with commonly held beliefs about the rights of parties and the limits of judges' power without imposing on the judicial system any great burden of excessive litigation or complicated factfinding. Accordingly, a partial answer to the judicial liability problem would be to hold liable judges who depart from traditional procedural protections—notice, opportunity to be heard, and, particularly, the right of review.

Adoption of this position would eliminate some of the injustice of the *Stump* doctrine, but this position addresses only a limited number of the common types of judicial wrongdoing. In our judgment, a more comprehensive solution requires taking the problem to a more fundamental level.

V. Synthesis: Form and Substance

We have suggested interpretations of key aspects of the history of judicial liability doctrine, but history provides no simple resolution. Policy analysis is inevitably inconclusive, although we have hinted at a way out of the confusion. We also have suggested that the rule of liability ought at least to be altered to avoid the

injustice of a situation such as *Stump* in which no review of the judge's action was available. In this final section, we synthesize the interpretive history and the policy in light of some contemporary jurisprudence to argue that the problem is both more complex yet more accessible than it has previously appeared.

Consider first the legal form common to most expressions of the doctrine of judicial liability and judicial immunity — the rule. A rule contemplates a mechanical decision process that, at its best, renders the decisionmaker passive, a process in which the decisionmaker merely ascertains objective facts and the rule states explicitly and precisely the result to follow from its application to the facts. The extent to which this degree of explicitness and precision can be achieved is described as the formal realizability of the rule. The opposite of a rule is a standard, principle, or policy, the application of which is as indeterminate as the application of a rule is determinate. A standard states a substantive objective of the legal system without specifying the facts to which it should be applied or the method and result of applying it.[380]

Commonly, judicial liability and immunity doctrines are expressed as rules, not standards. The recurrent element in all statements of the liability doctrine is the concept of judicial act; other elements of the tests have included concepts of superior or inferior court and the excess/absence of jurisdiction dichotomy. In the minds of the judges, as revealed by their opinions, these concepts are elements of rules, not standards, making judicial liability cases simple questions of logical entailment.

To take a particular example, recall Justice Field's doctrinal proclamation in *Bradley v. Fisher*:

> [J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter.[381]

This statement contemplates that the court in a damage action

380. *See* R. UNGER, *supra* note 208, at 63-103; *Form and Substance, supra* note 208; *Legal Formality, supra* note 208. *See also* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Chase, *supra* note 342; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L.J. 221 (1973).

381. 80 U.S. (13 Wall.) 335, 351 (1871).

against a judge will make the factual determination that the defendant is a judge of superior or general jurisdiction and that the act complained of was judicial and was within the judge's jurisdiction or merely in excess of jurisdiction. Once that determination is made, the operation of the rule renders the result automatic. If the pertinent facts are not found to be present, the opposite result is equally automatic. In either case, there can be no resort to arguments about the purposes to be served by the rule, its effectiveness in serving those purposes in the case, or any particular equities in the individual case.

One difficulty with this approach immediately presents itself. The ideal rule is wholly determinate, but in reality every rule is partly indeterminate. This is one element in a thorough critique of the system of adjudication. We do not address that critique here,[382] but at a more immediate level, rules in the judicial liability area are among the easiest to criticize for their lack of formal realizability.

Using Field's rule as an example, the first step in the rule application process is the determination of the operative premises of the rule. As we have seen, the concept of a court of superior jurisdiction was indeterminate throughout American judicial history. A court of general jurisdiction may be a more simple concept, but it again is not unequivocal.[383] For example, does a federal district court qualify? A federal district court has limited jurisdiction, but general jurisdiction within its limits. The way this question normally would be decided is by considering whether the purposes of judicial immunity would be served by bringing a federal judge within the Field test, but once the necessity of that inquiry is admitted, the approach becomes a standard and not a rule.

The objection may be made that the problem is merely one of inadequate definition, that the type of judge immunized could be described in the rule with greater specificity. This objection loses all force when we turn to the other operative premises of the rule. What, for example, is a judicial act? In light of the relevant case law, we think the courts use the term to describe any type of behavior sufficiently close to normal judicial conduct to be deserving of immunization, given the purposes of judicial immunity. This usage indicates that the test is a standard, not a rule.

382. *See generally* R. UNGER, *supra* note 208.
383. See note 338 *supra.*

This is an especially clear instance of the difficulty of stating a rule with enough clarity so that it can be applied with the ease contemplated by rule-oriented jurisprudence.

As should be evident from this discussion, the distinction between the legal forms of rules and standards parallels the distinction between the rhetorical styles of formalism and instrumentalism.[384] Practically, neither distinction separates the opposing concepts completely, but each distinction is useful analytically if viewed as a bipolar continuum of concepts. Thus, statements of policy may be found in a rule-oriented, formalist opinion, but that does not negate its basic quality. Each of these concepts is really a pattern of thought, not a description of personal character, and we would therefore expect to find judges expressing conflicting tendencies, although frequently one or the other tendency will be dominant.

From Kent's decision in *Yates v. Lansing* at least through Field's opinion in *Bradley v. Fisher,* most doctrinal statements were cast as rules.[385] The distinction between superior and inferior courts was the keystone of the doctrine, and the main subsidiary element was the scope of jurisdiction of an inferior court. The threshold question was whether the act complained of was judicial, but that seems to have been easily resolved in most cases. Thereafter, the rule purported to decree results upon determination of the factual issues. For example, if the judge is inferior and has acted outside his jurisdiction, liability attaches. The courts' conception of the process was quite clear: finding objective facts provides material for the mechanical application of a rule. The opinions are not without mention of policy, but the mention is merely superficial; the policy discussion was formulaic and had little effect on the decisions. Moreover, the policy discussion went to the justification for a basic doctrine of immunity and seldom to the issue of the limits of the doctrine, if any, as raised by the facts in the instant case.

In *Bradley,* Field continued the rule-based jurisprudence of judicial liability. His rule, however, was more complex than had been common in prior cases. Field recognized that the prior rules regarding lower court judges inadequately distinguished those situations in which extrajurisdictional acts should be actionable and

384. See notes 239-42 and accompanying text *supra.*

385. Throughout this discussion, we have not felt it necessary to cite our historical discussion.

those in which they should not be actionable, and he therefore introduced the excess/absence of jurisdiction distinction. Consistent with his legal outlook, Field's distinction was still rule oriented; for Field, an objective determination of which cases fall into which category was possible.

Following *Bradley*, a debate began over the law applicable to lower court judges. Thomas Cooley was among the first to try to reconcile on policy grounds the different treatment accorded superior and inferior judges. This attempt is evidence of at least some concern for the irrationality of different treatment. Cooley's defense of the older approach was refuted by courts and other treatise writers, with the result that eventually that approach was overthrown in favor of a unified treatment. What is important for the present inquiry is that the raising of policy concerns for the justification of the doctrine also should have caused some concern about the formal approach of the courts. Why that concern failed to occur in significant measure explains the choice of rule form.

Early courts could be satisfied with the rule form because it was consistent with their formalistic approach to this issue and, frequently, to all law.[386] When a court recognizes, however, that the source of the law is concern for the protection of judges and the legal system and for the other policy issues we have discussed, it also must recognize that a rule is not necessarily the appropriate legal form. Instead, the choice of form as well as the choice of result must be made on instrumental grounds, and those grounds might be better served by a form that permits resort in individual cases to the policies underlying liability and immunity. That form is, of course, a standard and not a rule. Any rule will be either under- or over-inclusive, immunizing too little or too much judicial behavior to fully achieve the policy results. A standard, on the other hand, would allow an individualized inquiry in each case into the result that would best further the underlying objectives of the doctrine of immunity. Despite this, a rule was nearly always preferred to a standard as the form of the liability doctrine and the preference was never explicitly considered.

We believe there are three possible explanations for the rule preference. The first two explanations are tactical ones. First, on any issue, the decision between rule and standard may be based

386. *See* M. Horwitz, *supra* note 137, at 4-9.

on the achievement of the objectives sought. There is a familiar set of arguments over the utility of rules or standards in general and in particular situations.[387] In the judicial liability area, the explanation of the rule preference on tactical grounds is quite simple. The assumption underlying immunity is that practically any liability would unduly burden the judge and the judicial process, that injuries caused to parties by judges must be uncompensated, and that judges can be sanctioned in other ways. The essential purpose of the rule is thus to limit the occasions on which a judge need fear liability. Values and rationality demand that sometimes a judge must be held liable and thus the second best immunity doctrine is an immunity rule of high generality. Such a rule will be over-inclusive, but it will achieve the desired effect; in other words, meritorious suits against judges are sacrificed to ensure that nonmeritorious suits are practically never brought. Since the principal fear is the necessity of inquiry into judicial behavior, a rule that approaches the poles of formal realizability and generality is appropriate.[388]

A second tactical explanation concerns the legitimating function of the rule. Neither rules nor standards are their own justification, but from the judicial point of view, standards have the disadvantage of overtly raising the policies involved in a case and a doctrine. Rules, on the other hand, have a comforting certainty to them, especially when couched in terms that give the appearance of inevitability and correctness. "Judicial act" is an excellent example of such a term. A rule that a judge will be immune for any "judicial act" is practically indisputable on its face, and a court predisposed to immunity will need little justification to find without reference to policy that anything short of a physical assault is a judicial act. Further, the operative terms of the rules give the illusion of certainty in the face of their indeterminacy, allowing a false sense of inevitability of decision. In sum, the judicial immunity rules have used terms of deceiving simplicity and power—judicial act, court of general jurisdiction, and excess of jurisdiction — to legitimate, at least for lawyers and judges,[389] decisions that might otherwise be regarded as unjust or,

387. *Form and Substance, supra* note 208, at 1694-1701.

388. This analysis applies with greater force to the broader immunity rules, such as *Stump*, than to other rules, such as the early nineteenth-century liability rule for inferior judges.

389. On the importance of ideology to the profession, see Tushnet, *Perspectives on*

at least, questionable.

These two tactical explanations are plausible; there is, however, a third explanation for the rule preference that relates form to substance. Duncan Kennedy has suggested that there are only two ideologies, denominated individualism and altruism, that encompass the range of theoretically possible legal positions on any given set of facts.[390] Kennedy's description of individualism holds that

> the essence of individualism is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested.[391]

On the other hand, "the essence of altruism is the belief that one ought *not* to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful."[392]

Each of these is an attitude and a rhetorical mode, not a characterization of individuals. Each of us, in our personal relations as well as our legal perceptions, is both individualistic and altruistic. As individuals, we define and strive for what we value without interference or assistance from other persons or the state. The justification for doing so may be a conception of the good, or the belief in the social utility of self-interest through the action of the market mechanism, or the impossibility of defining any values but subjective ones. As altruists, we identify our own interests with those of others and are willing to redistribute our own gain, share other's losses, and act to further such conduct in the future. Altruism is justified as inherently good, as a check on pure egoism, and as an affirmation of the existence of shared values. The difference, in essence, is one of caring and concern for others.

The opposing ideologies of individualism and altruism em-

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the Development of American Law: A Critical Review of Friedman's "A History of American Law," 1977 WIS. L. REV. 81.

390. *Form and Substance, supra* note 208, at 1713-22. For a modification and application of Kennedy's scheme that may be compared to our own, see *Buse v. School Finance Reform: A Case Study of the Doctrinal, Social, and Ideological Determinants of Judicial Decisionmaking,* 1978 WIS. L. REV. 1071.

391. *Form and Substance, supra* note 208, at 1713.

392. *Id.* at 1717 (emphasis in original).

body opposed visions of the ideal. Each ideology presents in general outline the elements of a good society and each vision makes a statement about the kind of individual conduct that will achieve and maintain a society based on those elements and the kind of legal system that will support, encourage, or coerce that conduct.[393]

The kind of legal system associated with individualism is one of legal or procedural justice. Under such a regime, rules are established to provide a framework for human activity, leaving individuals largely free to order their own affairs, bearing their own risk of gain or loss, and the devil take the hindmost. Legal justice thus furthers the basic individualist principle, self-reliance, and its corollary, lack of concern for others. The kind of legal system associated with altruism is one of substantive justice. Substantive justice embodies a concern for individuation in adjudication, in which resort to policy objectives is frequent and the concern is for achieving justice within the unique facts of a particular case. This kind of system is expressive of the basic altruist principles of sharing, sacrifice, and concern. Such a system also aims at these principles by sometimes encouraging such action and sometimes negatively sanctioning the failure to so act.[394]

The basic thrust of the application of these principles as stated is affirmative. Spurred by the legal system, people engage in the type of behavior appropriate to the striving for a particular vision of the good and the just. Another useful way of looking at the interaction of ideologies in the legal system is to consider their negative aspects. In terms of the human experience with each ideology, an important aspect is the type of behavior the ideology rejects as wrong or, at least, counterproductive. The distinction between the affirmative and the negative may be exaggerated, but it is convenient for analysis.

Edmond Cahn suggested in *The Sense of Injustice* a similar

393. Because individualist and altruist feelings and behavior are known to all of us, we would expect the legal system to reflect those attitudes and that behavior. The application of Kennedy's theory to the present issue is problematic, however, because Kennedy discusses only private law; although an action against a judge is a tort action, the defense of judicial immunity is a public law matter. Because the theory is useful, the difference in context requires only supplementation and extension, and not fundamental reformulation, but we note the point to emphasize that the application of the theory is ours, not Kennedy's.

394. *Cf.* R. UNGER, *supra* note 208, at 89-100.

distinction between justice and injustice as analytical devices.[395] Justice is a static concept, representing the ideal as developed through contemplation. The sense of injustice, though, is real and visceral, arising out of the experience in life of recognizing and confronting wrong. The ideal is then not a condition but an activity, the process of remedying injustice. The expression of individualism and altruism through the legal system takes parallel forms. In the individualist mode, the courts are concerned with removing obstacles to personal action and the parties' determination of their interests and with not imposing on individuals the burdens of others. Likewise, in the altruist mode, the courts may compensate for injuries by imposing nonconsensual duties, may reallocate bargaining power, and may prevent or sanction individualist behavior by imposing sharing, sacrifice, and concern as expressed in behavior.

What we saw throughout the American law of judicial liability was the predominance of individualism over altruism, both as a matter of theory and in the practical delineation of the legal doctrine. The predominance of individualism was reflected in the principal substantive aspects of the law—the immunity of superior judges, the liability of lower judges, and the trend from liability to immunity—and in the form of doctrinal expression, the rule.[396]

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395. E. CAHN, *supra* note 378, at 13-14.

396. Our principal concern is the result a judge should reach when presented with a judicial liability case. We have not developed what may be of equal importance, the process of conducting such a case. Our colleague Edward Chase has thoughtfully summarized a recent body of literature which addresses itself to the "potential richness" of the process of litigation of important issues.

> [One line of inquiry suggested by this literature] concerns the extent to which procedures can be seen as servants of important individual values other than the assurance of accurate determinations of guilt. Several possibilities appear. The *educative* role of procedures can be stressed. On this view, the individual's involvement in the criminal process is an opportunity for tutoring in the legitimate exercise of power, in which the state, through the proliferation of procedures that allow the defendant to act and speak, evidences the "commitment to real dialogue," which is at the heart both of political legitimacy and communal existence. Or a *cathartic* function might be emphasized, whereby the criminal process is seen as an opportunity for the redirection or channeling of aggression through the provision of a full and fairly even contest between the individual and the state. The role of procedure as an opportunity for *autonomous, self-determining* activity by the individual might be explored. In this view, the goal of the process is to ensure the fullest possible opportunity for participation by the individual in the decisions that affect him.

Chase, *supra* note 342, at 596 n.420 (citations omitted) (emphasis in original). The same

The attitude that has provided the basis of judicial immunity is the negative aspect of individualism, the attitude that is opposed to sharing the loss of an injured party by shifting it to another. The attitude of courts toward injured parties generally has varied through time, but their attitude toward those who have been injured by judges has largely been one of unconcern. This attitude has been motivated by certain aspects of the judicial liability problem and the judicial system generally. First, a distinction can be made between the ideology appropriate to the realm of private relations and the ideology appropriate to the area of the judicial process. The internal functioning of the judicial system is uniquely the realm of legal justice. The conception of the process is individualist, even though the results may be altruist, and the coerced sharing by a judge of a party's loss would not be a likely prospect, even for reviewing judges who otherwise exhibited strong altruist tendencies. Second, individualism is expressed in the failure of the judge to identify with the interests of the injured plaintiff. In most of the cases, there is a quite clear lack of empathy, which is, of course, an altruist characteristic, between the reviewing court and the injured victim. Finally, to the extent that sympathy for the victim is expressed, contrary policy arguments concerning mainly systemic and professional interests and leading to the limitation of altruist tendencies are forcefully asserted and relied on as the basis of decision.

As we know, injured parties have not been denied a remedy entirely, but even the extension of a remedy to them has had an individualist basis. Judges recognized that total immunity would be unacceptable, in part because of an altruist perception of the

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values, of course, can be expressed in non-criminal litigation, especially in judicial liability cases that share the possibilities of developing issues of political legitimacy and the relationship between the citizen and the state.

There is an obvious link between this approach and the analysis of individualism and altruism presented in the text. The process orientation is consistent with altruist concern and inconsistent with individualist rigidity. Interestingly, Chase criticizes the current Supreme Court for its lack of concern for such issues, *id.* at 596-97, as we have criticized it for its individualist lack of concern in the judicial liability area.

The works cited by Chase are J. MACMURRAY, THE SELF AS AGENT (1957); Ball, *Judicial Protection of Powerless Minorities,* 59 IOWA L. REV. 1059 (1974); Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater,* 28 STAN. L. REV. 81 (1975); Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process,* 79 YALE L.J. 359 (1970); Linde, *Judges, Critics and the Realist Tradition,* 82 YALE L.J. 277 (1972); Tribe, *Structural Due Process,* 10 HARV. C.R.-C.L. L. REV. 269 (1975); Note, *Plea Bargaining and the Transformation of the Criminal Process,* 90 HARV. L. REV. 564 (1977). *See also* J. NOONAN, PERSONS AND MASKS OF THE LAW 1-28 (1976).

harm actually or potentially caused by judicial wrongdoing, and in part because of the demands of a formally rational legal system. This perception, however, was that the problem was one caused by lower judges and the doctrinal response was directed at them. The nature of the higher judges' response, the way in which they imposed liability, showed no real concern for the situation of the lower judge. Instead, it represented the creation of a blanket rule which sometimes provided a remedy for the injured party, but practically never allowed a careful and concerned inquiry into the just resolution of a particular case. No attempt was made to assess the difficulties of the judge's position or his state of mind.

Over time, however, the alternative process did develop. In the late nineteenth and early twentieth centuries, little altruism was shown for the injured parties, but the unfairness of the situation of the lower judge became apparent, in large part because the reviewing judges more easily empathized with the position of the defendant judges. The combination of the two tendencies resulted in an expansion of immunity to protect lower judges, but provided no more succor to injured plaintiffs, showing a particularized kind of altruism.

The link between form and substance should now be apparent. The strong individualist emphasis in the law of judicial liability provides an explanation more broad than one of tactical choice for the courts' rule preference in the area. The rule form, the form that obviates resort to questions of policy and substantive justice, is supportive of the underlying attitude. The rule, in form as well as substance, well expresses the stiff, unconcerned approach of the courts to the entire area.

Examination of the majority opinion in *Stump v. Sparkman*[397] provides illustration. The opinion[398] approaches the individualist pole of the continuum. The harm to Sparkman was fortuitous and fortuitous harm frequently must be borne alone. No shifting of the loss to Judge Stump is necessary or appropriate because of the damage the potential of liability could inflict on the judicial system. The vision of the good society embodied in the opinion is an individualist vision, with little concern for the misfortunes of others. The form in which the expression is made

397. 435 U.S. 349, 351-64 (1978).

398. Recall that altruism and individualism characterize the argument but not the person making the argument. See notes 392-93 and accompanying text *supra*.

is the rule form. The initial statement of the rule seems open, but the interpretation closes the possibilities significantly, for, as the dissents make clear, immunity will be granted in practically every case under Justice White's formulation; the dissenters' resort to the underlying policies is rejected.

The contemporary alternative to this approach may be drawn from several commentaries[399] and cases, including the Seventh Circuit decision in *Stump*[400] and the Court of Appeal decision in *Sirros v. Moore.*[401] Advocates of that alternative perceive the difficulties and contradictions in the area, but are willing to resort to policy objectives to resolve them. Recognizing the judge's legitimate need for freedom from harassment, they also perceive a need to limit the judge's protection and to compensate injured parties. Despite the cost to the judicial system, the sense of injustice demands that judicial wrongs be righted. The usual resolution is to immunize the judge who has acted as a judge; that is, according to normal procedural standards in good faith. Such a standard shows concern for both injured plaintiff and defendant judge, and advocates believe it best reconciles the policy conflict.

Such a test, of course, may produce the consequences that the *Stump* test successfully avoids. Any test that requires inquiry into the judge's state of mind significantly increases the costs to the legal system. What we have, then, is another value conflict. The *Stump* majority values compensating harm and sanctioning wrongful conduct much less, and the smooth functioning of the judicial system much more, than the advocates of the alternative do. That value choice now may be seen in the context of the larger ideological conflict of individualism and altruism. But, as before, the antinomy of reason and value remains. We can no more rationally and convincingly argue for altruism over individualism than we can for the lesser value choice of the preferred doctrine of judicial liability, but we can reject the inevitability of the subjective and arbitrary nature of the problem because of the possibility of forging a legal order and a social order that will fulfill the vision of the altruist ideal.[402] Such a legal order would

399. See sources cited at note 4 *supra.*

400. Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977).

401. [1975] 1 Q.B. 118 (C.A.).

402. One criticism directed at this approach concerns the difficulty of acting on altruist principles in a largely individualist world. These critics disagree with the statement in the text urging the rejection of individualist behavior on the ground that much of value has developed out of individualism. For example, critics point out, cherished First

care for those injured by its agents and would not shrink from righting judicial wrongs for reasons of convenience. Even when the costs to others are too great to give a remedy to one injured party, this legal order would recognize and grapple with the injustice, rather than pretending it did not exist. In the judicial liability area, as elsewhere, remedying injustice is the way to justice. Each action taken, by judge and scholar, that rejects as unjust the individualist compromise and instead affirms the validity of the altruist ideal in the face of the contradictions of the legal order is an affirmation of the possibility of overcoming those contradictions in theory and in life. Each such judicial action has an immediate impact in remedying a concrete injustice[403] and, in our current state of legal development, each such affirmation, judicial or scholarly, has great symbolic power as well.

Amendment protections of free speech and free exercise of religion grew out of the individualist conception of the independent position of the individual vis-à-vis the state. While we recognize the strength of this criticism, we do not regard it as fatal to the altruistic approach. No truly desirable concept that has developed in the context of individualism is inconsistent with altruism. Free speech, for example, reflects an altruist belief in the dignity of the individual and the importance of individual participation in the growth of shared values as much as an individualist belief in self-reliance. Contrary to common belief, communitarianism is entirely consistent with human dignity. *See, e.g.*, K. Marx, *Economic and Philosophic Manuscripts*, in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 283-337 (L. Easton & K. Guddat eds. 1967). *See generally* B. OLLMAN, ALIENATION: MARX'S CONCEPTION OF MAN IN CAPITALIST SOCIETY (1971). The difficulty arises mainly because of the impossibility of describing at present a world which has yet to come into being, and of acting on the principles that will govern that world when we live in a world of people not yet persuaded of their validity. Nevertheless, part of the process of creating that world is the affirmation of its possibility, as stated in the text, even in the face of such criticism.

403. *Babylonian Talmud, Sabbath* 10a. "Every judge who judges . . . [truthfully] even for a single hour, the Writ gives him credit as though he had become a partner . . . [with God] in the creation." *Id.* (Soncino Hebrew-English edition).