VOL 31 ISS 2 ART 4 | II | 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 adaptation 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 extra-jurisdictional 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]

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 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 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 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. 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 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 also assumed that Yates' malpractice was within the jurisdiction of the court of chancery to punish. 5 Johns. at 288-89. 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 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 Clinton, 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 English law nor, more importantly, was it adequately justified in Kent's opinion.[164] 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 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. 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 extra-jurisdictional acts and then regarding malicious acts.

(a) Extra-jurisdictional 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.
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> 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 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 extra-jurisdictional 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 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 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 extra-jurisdictional 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 extra-jurisdictional acts, but often with different consequences.[192]

The South Carolina courts established an immunity for extra-jurisdictional 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 depraved.[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 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 decidedly 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 principle, 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 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 accordngly.[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 in attendance, 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 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 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 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 significantly 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 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 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 concluded 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 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 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 decision-making. Third, the judge would be in apprehension of the personal consequences of every decision, undermining the judicial 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 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 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]

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 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 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 addressed, involves the judicial 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 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; extra-jurisdictional 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 extra-jurisdictional 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.

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Footnotes

[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.

[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*.

[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 MASSACHUSETS SOCIETY, 1760-1830, at 14-18 (1975).

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

121. Id. at 17-18; Nelson, Office holding and Power wielding: 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 MASSACHUSEITS 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

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).

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

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.

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 JUDICLAL 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).

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. WHITEN, THE CONSTITUTON AND TH 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.

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

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).

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).

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).

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.

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.

[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).

[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).

[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 H v. L. Ray. 1667 (1976) [hereinafter cited as Form and Substance]; Kennedy, Legal Formality, 2 J. LEG. STUD. 351 (1973) [hereinafter cited as Legal Formality].

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. FRIED AN, 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 TIMS TO 1970 at 28 (1976).

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

217. Id. at 80, 146-49.

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. AUMARN, Tan 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.

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

226. See note 363 and accompanying text infra.

227. L. FRMN, 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. m 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).

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.

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; Scheiher, ***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.

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.

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

[249.] Justice Davis' brief dissent, id. at357, 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.

[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.

[260.] See notes 294-304 and accompanying text infra.

[261.] 80 U.S. (13 Wall.) at 350-51.

[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.

[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 YAL. 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.

[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).

[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).

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).

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.

[308.] See W. TWNIG, 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.

[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.