VOL 31 ISS 2 ART 4 | IV | SYNTHESIS: FORM AND SUBSTANCE

We have suggested interpretations of key aspects of the history of judicial liability doctrine, but history provides no simple resolution. Policy analysis is inevitably inconclusive, although we have hinted at a way out of the confusion. We also have suggested that the rule of liability ought at least to be altered to avoid the injustice of a situation such as *Stump* in which no review of the judge's action was available. In this final section, we synthesize the interpretive history and the policy in light of some contemporary jurisprudence to argue that the problem is both more complex yet more accessible than it has previously appeared.

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

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

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

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

> excess of jurisdiction and the clear absence of all jurisdiction over the subject matter.[381]

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

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

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

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

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

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

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

In *Bradley*, Field continued the rule-based jurisprudence of judicial liability. His rule, however, was more complex than had been common in prior cases. Field recognized that the prior rules regarding lower court judges inadequately distinguished those situations in which extra-jurisdictional acts should be actionable and those in which they should not be actionable, and he therefore introduced the excess/absence of jurisdiction distinction.

Consistent with his legal outlook, Field's distinction was still rule oriented; for Field, an objective determination of which cases fall into which category was possible.

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

Early courts could be satisfied with the rule form because it was consistent with their formalistic approach to this issue and, frequently, to all law. 86 When a court recognizes, however, that the source of the law is concern for the protection of judges and the legal system and for the other policy issues we have discussed, it also must recognize that a rule is not necessarily the appropriate legal form. Instead, the choice of form as well as the choice of result must be made on instrumental grounds, and those grounds might be better served by a form that permits resort in individual cases to the policies underlying liability and immunity. That form is, of course, a standard and not a rule. Any rule will be either under- or over-inclusive, immunizing too little or too much judicial behavior to fully achieve the policy results. A standard, on the other hand, would allow an individualized inquiry in each case into the result that would best further the underlying objectives of the doctrine of immunity. Despite this, a rule was nearly always preferred to a standard as the form of the liability doctrine and the preference was never explicitly considered.

We believe there are three possible explanations for the rule preference. The first two explanations are tactical ones. First, on any issue, the decision between rule and standard may be based[386]. See M. Howritz, supra note 137, at 479. on the achievement of the objectives sought. There is a familiar set of arguments over the utility of rules or standards in general and in particular situations.[387] In the judicial liability area, the explanation of the rule preference on tactical grounds is quite simple. The assumption underlying immunity is that practically any liability would unduly burden the judge and the judicial process, that injuries caused to parties by judges must be uncompensated, and that judges can be sanctioned in other ways. The essential purpose of the rule is thus to limit the occasions on which a judge need fear liability. Values and rationality demand that sometimes a judge must be held liable and thus the second best immunity doctrine is an immunity rule of high generality. Such a rule will be over-inclusive, but it will achieve the desired effect; in other words, meritorious suits against judges are sacrificed to ensure that non-meritorious suits are practically never brought. Since the principal fear is the necessity of inquiry into judicial behavior, a rule that approaches the poles of formal realizability and generality is appropriate.[388]

A second tactical explanation concerns the legitimating function of the rule. Neither rules nor standards are their own justification, but from the judicial point of view, standards have the disadvantage of overtly raising the policies involved in a case and a doctrine. Rules, on the other hand, have a comforting certainty to them, especially when couched in terms that give the appearance of inevitability and correctness. "Judicial act" is an excellent example of such a term. A rule that a judge will be immune for any "judicial act" is practically indisputable on its face, and a court predisposed to immunity will need littl6 justification to find without reference to policy that anything short of a physical assault is a judicial act. Further, the operative terms of the rules give the illusion of certainty in the face of their indeterminacy, allowing a false sense of inevitability of decision. In sum, the judicial immunity rules have used terms of deceiving simplicity and power-judicial act, court of general jurisdiction, and excess of jurisdiction - to legitimate, at least for lawyers and judges,[389] decisions that might otherwise be regarded as unjust or, at least, questionable.

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

> the essence of individualism is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct

> for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested."[391]

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

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

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

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

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

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

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

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

As we know, injured parties have not been denied a remedy entirely, but even the extension of a remedy to them has had an individualist basis. Judges recognized that total immunity would be unacceptable, in part because of an altruist perception of the harm actually or potentially caused by judicial wrongdoing, and in part because of the demands of a formally rational legal system. This perception, however, was that the problem was one caused by lower judges and the doctrinal response was directed at them. The nature of the higher judges' response, the way in which they imposed liability, showed no real concern for the situation of the lower judge. Instead, it represented the creation of a blanket rule which sometimes provided a remedy for the injured party, but practically never allowed a careful and concerned inquiry into the just resolution of a particular case. No attempt was made to assess the difficulties of the judge's position or his state of mind.

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

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

Examination of the majority opinion in *Stump v. Sparkman*[397] provides illustration. The opinion[398] approaches the individualist pole of the continuum. The harm to *Sparkman* was fortuitous and fortuitous harm frequently must be borne alone. No shifting of the loss to Judge Stump is necessary or appropriate because of the damage the potential of liability could inflict on the judicial system. The vision of the good society embodied in the opinion is an individualist vision, with little concern for the misfortunes of others. The form in which the expression is made is the rule form. The initial statement of the rule seems open, but the interpretation closes the possibilities significantly, for, as the dissents make clear, immunity will be granted in practically every case under Justice White's formulation; the dissenters' resort to the underlying policies is rejected.

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

Such a test, of course, may produce the consequences that the *Stump* test successfully avoids. Any test that requires inquiry into the judge's state of mind significantly increases the costs to the legal system. What we have, then, is another value conflict. The *Stump* majority values compensating harm and sanctioning wrongful conduct much less, and the smooth functioning of the judicial system much more, than the advocates of the alternative do. That value choice now may be seen in the context of the larger ideological conflict of individualism and altruism. But, as before, the antinomy of reason and value remains. We can no more rationally and convincingly argue for altruism over individualism than we can for the lesser value choice of the preferred doctrine of judicial liability, but we can reject the inevitability of the subjective and arbitrary nature of the problem because of the possibility of forging a legal order and a social order that will fulfill the vision of the altruist ideal.[402] Such a legal order would care for those injured by its agents and would not shrink from righting judicial wrongs for reasons of convenience. Even when the costs to others are too great to give a remedy to one injured party, this legal order would recognize and grapple with the injustice, rather than pretending it did not exist. In the judicial liability area, as elsewhere, remedying injustice is the way to justice. Each action taken, by judge and scholar, that rejects as unjust the individualist compromise and instead affirms the validity of the altruist ideal in the face of the contradictions of the legal order is an affirmation of the possibility of overcoming those contradictions in theory and in life. Each such judicial action has an immediate impact in remedying a concrete injustice[403] and, in our current state of legal development, each such affirmation, judicial or scholarly, has great symbolic power as well.

Footnotes

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

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

382. See generally R. UNGER, supra note 208.

383. See note 338 supra.

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

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

[386] see M. Horwitz, supra note 137, at 4-9.

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

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

[389.] On the importance of ideology to the profession, see Tushnet, ***Perspectives on the Development of American Law: A Critical Review of Friedman's*** "***A History of American Law***," 1977 Wis. L. REV. 81.

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

[391.] Form and Substance, supra note 208, at 1713.

[392.] Id. at 1717 (emphasis in original).

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

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

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

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

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

> procedure as an opportunity for autonomous, self-determining activity by the individual might be explored. In this view, the goal of the process is to ensure the fullest possible opportunity for participation by the individual in the decisions that affect him.

Chase, supra note 342, at 596 n.420 (citations omitted) (emphasis in original). The same values, of course, can be expressed in non-criminal litigation, especially in judicial liability cases that share the possibilities of developing issues of political legitimacy and the relationship between the citizen and the state.

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

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

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

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

[399.] See sources cited at note 4 supra.

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

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

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

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

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