RIZZO ON RULES: A COMMENT

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I agree with Professor Rizzo's basic view that the law should facilitate individual self-realization.[1] I wish I could stop there and say that my disagreement with Rizzo's analysis is a matter of mere detail. Unfortunately almost everything of importance here lies in the details, and on most of these details my view of the legal order appears to be different from Rizzo's. I say "appears to be" advisedly; I cannot be sure, for there are portions of his argument that I find difficult to follow.

Spontaneity versus Order

My difficulty arises early in the paper. Rizzo, following Hayek, views the common law as central to the notion of "spontaneous order." While "spontaneous order" is not defined, I interpret the general intent of it to be a scheme that strongly favors individual ordering over collective choice. Although I have a similar preference, that preference does not get me very far in resolving the hard questions. The expression "spontaneous order" is itself rather misleading in glossing over a fundamental tension between two important themes: "spontaneity," interpreted as individual freedom, plainly conflicts with "order," interpreted as protecting one individual against the effects of another's freedom.

The conflict between these two notions cannot be erased by the simple conjunction of opposing terms. The problem after all is not semantic—a mere matter of defining one end of the conjunction so as to embrace its opposite end. It is a matter of substantive philosophical principle: When must individual liberty yield to the demands of order, and vice versa? I would not pause on this point if I thought

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[1]Rizzo (1985).

Rizzo's use of the phrase was simply ornamental—as with Cardozo's famous phrase "ordered liberty." The problem I have with Rizzo's phrase is that he wants it to carry the burden of a particular view of the legal system and of legal rules. I do not think it can carry that burden.

Spontaneous Order and Common Law

For Rizzo, as for Hayek, there is a special affinity between spontaneous order and the common law, but the affinity is not well explained. We are told that the model of the common law is one of "purely private rule creation," as distinct from legislation that is a matter of sovereign power.

This view of law confuses form with substance. To be sure the common law frequently does embody a scheme of private ordering, as Rizzo illustrates with an example of contract law. The private ordering, however, inheres in the substantive body of the law and not in the form in which it is implemented. Contract law is no less private ordering when it is codified by the legislature (as in the case of the Uniform Commercial Code) than when it is uncodified. Conversely, tort law is no less a scheme of public ordering according to collective norms when enforced through common law rules than when codified in statutes.

The common law process may be more conducive to individual freedom than legislation insofar as it is more flexible in adapting legal rules to particular circumstances. The accommodation of different situational demands permits a wider range of individual action based on the environment and circumstances in which action is taken. This accommodation serves the interest of individual freedom in permitting actors to vary their conduct in light of the needs and interests of different situations as opposed to invariant rules that command or forbid behavior without regard to different social contexts. But I doubt this is quite what Rizzo has in mind as a defense of the common law, because this accommodation depends on rules that adjust to the balance of interests in each case and it is precisely such a balancing of interests that Rizzo attacks. This point brings me to Rizzo's central argument for "purposeless," "abstract," "policy-neutral" legal rules.

Policies and Rules

For Rizzo the preeminent virtue of the common law process is its "incremental" and "purposeless" character. The first, as he notes, is fairly obvious: It is the quintessential feature of the common law that

legal rules evolve from adjudication of individual disputes, not from singular, simple declarations of sovereign will.

The second aspect, as he also observes, is "more difficult to appreciate." Part of the problem may be semantic. For Rizzo the common law is "purposeless" insofar as judges' aims in rendering decisions are indeterminate and the consequences of their decisions are not entirely foreseeable.

I do not think this is a useful way to think about the matter. It is not a question of whether the common law judge acts purposefully but according to what purpose he acts—specifically whether the judge renders decisions entirely within the framework of existing legal material or whether he appeals to policy considerations of efficiency or fairness that are not bounded by strictly legal material. I take the thrust of Rizzo's argument to be an endorsement of the former—an argument for what can be loosely described as a "formalist," as opposed to a "positivist," conception of the judicial role. If I interpret him correctly, Rizzo's arguments parallel those of Ronald Dworkin (1977), although they are articulated in a rather different manner.

I agree with this model of adjudication up to a point, although it seems to me that Dworkin—and, by my interpretation, Rizzo—both exaggerate the difference between rules and policy. It may be that judges are expected to decide cases according to principles found in or derived from legal materials such as precedent, statutes, and constitutional rules. These materials, however, often provide no clear guidelines for the disposition of particular "hard cases," to use Dworkin's phrase. Indeed, even in relatively "easy" cases, the selection of which "relevant" legal materials to be interpreted involves a degree of subjective value preferences that we cannot and do not expect judges to forego. As Judge Henry Friendly once remarked, we expect judges to be neutral but not sterile when they don their judicial robes. The conception of a judge sifting through conflicting arguments of legal principle, guided only by some vision of abstract legal principle, with no thought to whether the principle makes any sense in terms of contemporary social policy (as reflected in the case *sub judice*) brings to mind Aristotle's conception of God as pure thought thinking about itself. However interesting such a conception, it cannot have much practical force in law.

Rizzo's idealized depiction of the common law process bears no resemblance to the legal system I know. His example of the evolution of the law on negligent infliction of emotional distress suggests an almost effortless dynamic in which pure principle (as precedent) unfolds itself. One would not think from his description that judges

who participated in this legal evolution ever gave a thought to policy considerations underlying negligence liability. That is very hard to imagine. By what pure "principle" (that is, principle of logical interpretation uncontaminated by social policy consideration) could it have been deduced that a mother who witnesses her child being run over by a car can recover from her emotional distress but a mother who does not witness it but hears an impact and her child's scream cannot? Simple interpretivism of "principle" in Rizzo's sense gives us very little guidance, unless we make conscious reference to the social policies embedded in the rules—the precedent—before us. However, even that will not quite do without some reference to contemporary conditions (and policies), for otherwise we would be forever stuck with the original rule; Rizzo's much-admired common law "dynamic" would be a stasis. In short, some evaluation of policy and law as an instrument of policy, as well as principle, seems to me the essential motive force of change.

The rigid distinction between interpretivism and positivism implicit in Rizzo's (and Dworkin's) model of common law adjudication is thus unrealistic. In any case, adhering to a rule-based model of adjudication does not necessarily proscribe interest balancing in the way Rizzo supposes. A rule may explicitly incorporate a policy based on interest balancing according to some set of standards set down in the rule. A judge who then proceeds to balance does not depart from principled, rule-based jurisprudence. A judge who, faithful to the principles of negligence law, balances the benefits and costs of a particular activity is perfectly faithful to the model of rules. He would depart from that model only if he applied social criteria that were not embraced within the set of material that we identify as the relevant legal universe in which he is supposed to act. (Notice incidentally that "balancing" does not necessarily entail a utilitarian framework as Rizzo appears to imply; even within a deontological framework, it is necessary to accommodate conflicting rights, and in practical terms such an accommodation can be understood only as an exercise in "balancing.")

At this point Rizzo appears to go beyond the model of rules explicated by Dworkin, for he appears to perceive some inherent vice in balancing even if balancing is embraced by a formal legal rule. I cannot really tell what that vice is; it seems to be a notion that the weighing of individual variables (interests or rights) in specific contexts is incompatible with principled jurisprudence. In this regard Rizzo seems to equate principled jurisprudence with the purely formalistic application of general rules (precedent). His endorsement

of Epstein's (1973) strict liability model for tort law illustrates Rizzo's own conception of the law.

General and Individual Justice

I do not want to explore Epstein's particular model of strict liability. I have grave reservations about it on moral as well as practical grounds, but those reservations are only tangentially relevant here in that Rizzo's argument for fixed rules with formalistic application transcends any particular field of law.

I have some sympathy for Rizzo's argument, although it is a sympathy grounded more in pragmatism than in high principle. Adjudications that involve individualized balancing (of "interests" or of "rights") are costly. In a complex world, rules cannot "fit" each and every case. We must accept some misfits simply because the costs of trying to achieve individualized "justice" would swamp any possible gains in terms of fairness or efficiency.

The costs of ad hoc balancing lie not simply in the administrative cost of individualization, but also in the erosion of the force of the rule. Ad hoc adjudications increase uncertainty of enforcement as a consequence of judicial variation. They also encourage strategic behavior by private parties to avoid the application of the rule through loopholes in the law. Furthermore, they invite judges and juries to substitute their preferences for particular outcomes for "principled" interpretation of rules. The greater the degree of individualization, the greater the opportunity for erosion of both the effectiveness and the legitimacy of rule.

Administrative costs and rule erosion may justify a system of legal rules and enforcement that is, more or less, insensitive to individual cases. Our law is full of illustrations. Per se rules in antitrust law are one notable example. So too are a wide variety of statutory offenses that impose a fixed, "strict" liability. Even tort law, which relies fundamentally on ad hoc enforcement, puts limitations on individualized determinations. The question is how much further to advance the supremacy of generic rules over individualized adjudication. I do not pretend to have an answer, but I do have a couple of vagrant biases.

It is not easy to generalize about the vice and virtue of generalization. Two areas of law—antitrust and tort law—can illustrate the point.

For most of its modern history—since World War II at least—the dominant trend in antitrust has been toward development of fixed rules applied without excuse or exception. The per se rule against

price fixing is the most prominent but not the only case in point. The underlying premise of this trend was that it would decrease the cost of enforcement and increase the effectiveness of antitrust rules. The record on this issue is by no means unambiguous, but two things seem evident. First, the difficulty of clearly defining the metes and bounds of the so-called per se rules has led to costly adjudication over the boundary question. The rule that price fixing is illegal per se may be simple and relatively less costly to enforce than a rule of reason that would weigh the social utility of the action in the light of each context. But what, after all, is "price fixing"? (Anyone who thinks this an easy question save only in the simplest case needs a tutorial in antitrust law.) No doubt we could refine and clarify the definitional question so as to minimize disputes, but the more we do so, of course, the greater the probability of an egregious misfit in applying the rules to individual cases. In fact, many critics of antitrust think that is precisely what has happened with the per se jurisprudence in antitrust.

Second, the pervasive use of per se rules in antitrust has not necessarily led to a more principled jurisprudence. In fact, the often arbitrary character of the per se rules has been the despair of thoughtful antitrust scholars. The more arbitrary the per se rule, the more it has induced selective enforcement by public enforcement agencies and, on occasion, judicial invention, precisely to avoid what would otherwise be irrational results. As one can see from a scanning of the case reports, however, such efforts do not prevent all irrational results.

Much the same point can be made about per se rules in tort law. Rizzo appears to have some nostalgia for the 19th-century tort law insofar as it sought to adhere to simple, abstract, and rather fixed liability rules. It is beyond the scope of this comment to consider how well those rules really worked in that simpler age. Suffice it to say that I find it difficult to understand how it could be thought to be any more "principled" or just or cost effective than the law of modern times.

Irrespective of that point, consider for a moment the modern experience with per se tort rules. The attempt to develop clear and sensible per se rules for tort law has emerged most prominently in the area of products liability. The manufacturer of a "defective product" is strictly liable—liable per se. So the simple rule says. On closer examination, however, the simple rule is very deceptive. Laying aside all of the many exceptions that have been created to make the simple rule sensible, the very meaning of the rule in its per se form is problematical. What is a "defective product"? Is a microbus defective if its front end collapses on impacts at speeds of 20 miles per

hour? What about a rotary lawnmower that keeps on running while an impatient user reaches underneath the blade housing to remove a branch? Is a bottle of perfume defective if it does not disclose that its contents are inflammable? These examples could be expanded indefinitely, but the point should be clear: The same definitional problems that have thwarted the seeming simplicity of antitrust per se rules have had a similar effect on per se tort rules.

Likewise, in other areas of the law, the harder we strive for simplicity, the more we exacerbate the "misfit" between the rule and the problems to be addressed. Ultimately, if we go far enough, we will have only barren form or mindlessly mechanical rules that cannot command any practical or ethical respect.

Conclusion

Life is complex. No doubt we could simplify it somewhat. No doubt simplifying our legal world would be a useful beginning. However, I think the kind of abstract simplicity that Rizzo seeks in the common law world generally is a delusion. It cannot be achieved without intolerable sacrifice to the integrity of the law and the social justice for which the law is supposed to be designed.

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"RULES VERSUS COST-BENEFIT ANALYSIS IN THE COMMON LAW": A COMMENT

Steve H. Hanke

To set the stage for the remarks that follow, a brief summary of Professor Rizzo's position is in order.[1] He judges a legal system to be superior if it is policy-neutral (does not impose a particular hierarchy of ends on society) and if it facilitates the attainment of individual, private goals. If it is based exclusively on abstract rules, Professor Rizzo asserts that a system of common, judge-made, private law represents such a superior legal system. By way of contrast, he rejects as being inferior, any legal system that employs cost-benefit analysis (a balancing of interests). To develop his argument, Professor Rizzo makes use of the common law of torts. For the assignment of liability in this field, he favors the application of a strict liability rule, rather than negligence systems that require the use of cost-benefit analysis.

Although I accept Professor Rizzo's position concerning the proper role of a legal system, I question certain aspects of his analysis. To illustrate the importance of the deficiencies in Professor Rizzo's analysis, we can turn to the common law of contracts. The instrumentality used to assign liability in breach of contract cases is not cost-benefit analysis. Instead, a strict liability rule is applied.[2] Thus, for liability to be imposed on a breaching party, a victim of a breached contract does not have to prove that the cost to him exceeds the benefit to a breaching party.

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[1]Rizzo (1985).

[2]There are exceptions to this statement, but they are extremely rare. For example, contracts can be discharged because of lack of consideration, mutual mistake, fraud, incapacity, duress, and impossibility.