LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

> The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct.[1]

The twentieth century will surely be remembered for, among other events, an extraordinary growth in the scope and detail of government regulation. From a very small beginning in transportation, finance, broadcasting, and certain sectors of the energy industry, regulations of federal, state, and local governments now influence virtually every good and service that we buy and every activity we undertake. Part of the growth in regulation can be attributed to increased budgets at all levels of government. Although it took until the 1920's for government's share of the gross national product to rise above 10 percent, that amount reached 20 percent by the 1930's and 30 percent by the 1960's.[2] More importantly, regulation is now the fastest growing segment of government activity. The number of employees assigned to thirty top federal regulatory agencies grew 5.1 percent between fiscal year 1977 and fiscal year 1979, while the overall growth of total federal employment during the same period is projected to be only 1.2 percent.[3]

Accompanying this growth is an increasing awareness that regulation may not diminish the problems that it is supposed to cure. Indeed, regulation may even create new problems, actually reducing the well-being of consumers.[4]

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1. Grimm v. Arizona Board of Pardons & Paroles, 115 Ariz. 260, 266, 564 P.2d 1227, 1233 (1977).

2. *See* T. BORCHERDING, BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 26 (1977).

3. American Enterprise Institute for Public Policy Research, *New Federal Budget Calls for More Regulators*, REGULATION 6, 7 (March-April, 1978).

4. For example, regulation of the airline industry's routes and minimum fares demonstrably raises prices that consumers would pay, were the industry competitive. *See* SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMMISSION ON THE JUDICIARY OF THE UNITED STATES SENATE, S. REP. NO. 1374, 94th Cong., 1st Sess. (1976) and sources cited therein.

The costs of regulation have prompted individuals to seek alternatives, a movement that has had the enthusiastic support of the last two administrations, one Republican and one Democratic. Attempts to deregulate the transportation industry are a good example of this support.

While citizens have become increasingly aware that governmental institutions and the officials who control them may err, they have also recognized that they have limited remedies for harms attributable to government officials. One barrier that prevents them from successfully maintaining a cause of action for these harms derives from the concept of sovereign immunity, borrowed from the English common law. Mr. Justice Holmes once stated that sovereign immunity was based on the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[5] English common law developed the idea that since "the king can do no wrong," he could not be sued unless he gave his consent. In moving to an institutional government, the English law generalized the king's immunity, making it often impossible to sue government officials. As government grew, courts began questioning immunity, and the process of eroding this barrier continues today. In the United States, a major departure from immunity came in 1946 with the passage of the Federal Tort Claims Act (FTCA). The FTCA allows a party who is harmed by the "negligent or wrongful act or omission of any employee of the Government"[6] to sue the United States for actual damages. The government, however, is not liable for such intentional torts as defamation, misrepresentation, and deceit or for discretionary acts of its officers. In addition, suits are increasingly brought against officials based on common-law principles, the civil rights legislation, and the Constitution.[7]

In recent years, immunity of the government and its officials has been questioned seriously. For example, the Arizona Supreme Court ruled that the State Board of Pardons and Paroles was not immune from liability to victims of crimes committed by persons on parole.[8] The Court declared that "[i]n this day of increasing power wielded by government officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous."[9] At the federal level, officials in the U.S. Department of Agriculture were unsuccessful in attaining absolute immunity for all discretionary acts within their scope of authority.[10] In a suit in damages for unconstitutional action, the Court found that federal officials exercising discretion are entitled only to the

5. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).
6. 28 U.S.C. 1346(b).
7. *See generally* J. Mashaw and R. Merrill, *Introduction to the American Public Law System* (1975).
8. Grimm v. Arizona Board of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977).
9. *Id.* at 266, 564 P.2d at 1233.
10. Bute v. Economou, 46 U.S.L.W. 4952 (June 29, 1978).

qualified immunity provided for state officials in *Scheuer v. Rhodes*,[11] the case involving the shooting of students at Kent State during the Cambodia invasion of 1970. At the same time, the United States Senate has taken an active role in attempting to modify liability rules in government. For example, in April 1978 legislation was introduced to amend the Federal Tort Claims Act.[12] This legislation would broaden the potential standing and remedies for victims of the constitutional and intentional common-law torts of federal employees by permitting suits against the federal government.

There is a growing body of legal and economic literature that accompanies these changes in the liability of government officials. This literature demonstrates how the assignment of liability influences individual behavior by changing the costs of engaging in alternative actions. For example, tort law acts as a system for effectively deterring inefficient conduct.[13] Thus, sovereign or individual immunity in tort may encourage inefficient behavior. Without potential liability, a government official may not consider as carefully as he otherwise might the potential harm that his activities may cause to others. The issues are by no means clear-cut, however. Many argue that tort liability will make officials overcautious. Further, one's attitude toward potential liability may be influenced by how he views the benefits of the government activity involved. For example, those who believe that law has placed too many constraints on police may not welcome the additional constraint of tort liability, while those who believe that police have too much discretion would presumably have a contrary opinion.[14]

To explore these issues in detail, in the spring of 1977 the Law and Economics Center at the University of Miami School of Law conducted a seminar on the civil liability of government officials. The seminar was sponsored by Liberty Fund, Inc., as part of its program. Thirty-two economists, law professors, and political scientists gathered to discuss the implications of modifying civil liability for government actions.[15] This symposium is a printed result of that seminar, containing the central paper, four prepared commentaries, and a transcript of the discussion that followed those five presentations. The seminar produced in-depth treatment of several topics, many of which lie

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11. 416 U.S. 232 (1974).

12. 124 CONG. REC. S.5192-95 (daily ed. April 10, 1978). The Administration apparently supports an alternative bill, S.2117, that would make recovery from the United States exclusive in every case.

13. *See generally* Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973) and Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1973).

14. This issue is not academic as police apparently are having difficulty in securing insurance to protect themselves from the costs of suits. *See* O'Donnell, *Police Find It Harder Or Impossible to Get Any Liability Policies*, The Wall Street J. Nov. 7, 1977, at 1, col. 1).

15. A list of the participants and affiliations at the time of the seminar appears at the end of this Foreword.

outside the normal bounds of either legal or economic inquiries concerning the liability of government officials. In the central paper of the conference, Professor Mashaw discusses civil liability as a tool that supplements traditional processes of restraint such as procedural safeguards, legislative oversight, and judicial review. Where these processes are not effective, civil liability generates the information necessary for evaluation of government actions. In addition, Professor Mashaw considers whether liability skews officials' incentives.

While Mashaw argues that the desirability of civil liability varies with the effectiveness of traditional mechanisms of oversight and procedure, Professor Shepsle proposes in his commentary that the usefulness of civil liability should vary instead with the types of errors that a decision process produces. Some types of errors are likely to occur even under systems of liability, while others are quite susceptible to minimization by the imposition of liability. To the extent that the latter type of error is present, civil liability will have the positive effect of providing an incentive for efficiency. Next, in analyzing official liability, Professor Baxter draws an analogy between private and governmental enterprises. He asserts that both are responsive to suits against them and that, even without seeking indemnification from the responsible employees, suits impose appropriate sanctions against parties who act improperly. He views this as an implicit recognition that indemnification may skew incentives too greatly. Thus, it is sufficient to have an action against the enterprise. Finally, Baxter abandons his analogy in those cases where the courts would be second-guessing other branches of the government: while it may be appropriate for courts to do so with regard to private parties, this is not the case within the government.

In his comment, Professor Epstein classifies potential tort cases against governmental officers into two basic groups: first, those not intrinsically governmental and discretionary, and second, those where officials "bear a uniquely governmental duty." He argues that normal tort principles should apply to the former. With regard to the latter, however, he submits that decisions concerning immunity must be based on an empirical analysis of incentive structures. Finally, Professor Olson initially states that relaxation of immunity is desirable insofar as it provides healthy incentives and generates information. He feels, however, that it cannot remedy official malfeasance or misfeasance that does not directly affect anyone since, in such cases, the law does not provide the framework for a suit. In addition, the cost of litigation may offset any gains obtained through the imposition of liability. Further, he notes that in many cases it would be impossible for a court to determine whether an official has correctly performed his duties.

The discussion section that follows contains the proceedings of the seminar, reorganized, edited, and footnoted for publication. In the first of the six sections, Professor Mashaw responds to the four prepared commentaries. Sec-

tion II traces the development of the immunity doctrine, trying to define its present purpose. Section III considers whether the government responds to public needs or to private interests and how the answer to this question should affect the immunity rules. Section IV explores alternatives to civil liability—legislative oversight, procedural restraints, and judicial review. The discussion here also raises and evaluates the difficulties with imposing civil liability and whether the alternatives are better suited to furthering public policy. Section V attempts to determine the effect of civil liability on the incentives of public employees. Will it deter them from taking necessary risks and making difficult decisions? How responsive will the agencies be to the incentives provided by civil liability? Can the problem of skewed incentives and the need for a behavior modifying mechanism be reconciled by a rule of liability combined with indemnification? Finally, in Section VI members of the conference suggest areas for further research.

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