PRIVATE-LAW MODELS FOR OFFICIAL IMMUNITY*

RICHARD A. EPSTEIN†

INTRODUCTION

The problem of official immunity, standing as it does at the crossroads of private and public law, is of pressing social importance and great intellectual difficulty. Official immunity is intimately bound up with the private law because the plaintiff's basic cause of action, the alleged infliction of some compensable harm, sounds in tort. By the same token official immunity is bound up with public law because, wholly apart from any tort defense, the sued official claims that his public status alone permits him to escape the rigors of the private law. The major theoretical difficulty in official-immunity cases therefore involves the reconciliation of two separate legal traditions. We begin our analysis with the private law of tort, only to merge it at the end with a discussion of public policy and social control.

I

The basic principles of tort liability have been the subject of much debate and there is, even at this late date, no agreement either upon the proper choice of a tort rule or upon the proper theoretical foundations for choosing one. Professor Mashaw in effect adopts without argument the negligence model as the basis of liability, concentrating his attention upon its incentive effects. He notes too that it is possible to use an alternative model (as I have done) which posits a basic principle of strict liability offset by excuse or justification.[1] The choice of the original liability rule and the reasons for its adoption are more central to an understanding of official immunity, I think, than Mashaw appears to assume.[2] Thus, if general negligence theory is to be the

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* This article is a commentary on Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, LAW & CONTEMP. PROB., Winter 1978, at 8. It was originally presented, in an earlier draft at the Liberty Fund, Inc., Seminar on Civil Liability and Government Officials, administered by the Law and Economics Center of the University of Miami School of Law (April 15-17, 1977).—Ed.

† Professor of Law, University of Chicago School of Law; Fellow, Center for Advanced Study in the Behavioral Sciences, 1977-78.

1. Mashaw, *Civil Liability of Government Officers*, LAW & CONTEMP. PROB., Winter 1977, at 8. *See* my three papers, Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975). In none of these papers did I address the question of sovereign immunity.

2. Mashaw tends to discuss the problem, as do many modern writers, in terms of property

basis of tort law, then any legal rule which describes the immunities of public officials in terms of the reasonableness and good faith of their conduct does little more than restate as an immunity rule what already exists as a substantive rule of liability. Yet if strict liability is to be the basic principle, then even recognition of a qualified immunity for official acts performed reasonably and in good faith will mark a deviation from the legal norm, one that will in turn require us, if the theory is to be complete, to offer some special justification.

We return, then, to our major problem: What should be the general basis of civil liability against which we shall measure the special immunities, if any, of public officials? Here I think that the best answer requires us to recognize that no single standard is appropriate in all cases. A distinction must be made between (1) a plaintiff who before the occurrence of the injuries was a stranger to the defendant and (2) a plaintiff who before the occurrence of the injury stood in some special relationship to the defendant.[3] For a plaintiff who falls on the first side of the line the general rule of strict liability has to my mind always been preferable, because it alone provides the injured party with complete protection against the aggression of another and prevents the defendant from setting up his benefits as justification for the plaintiff's losses.[4]

Physical injuries arising out of consensual relationships (such as those between licensor and licensee, physician and patient, or employer and employee, whether or not governed by formal contracts) are of equal importance. But with these cases strict liability loses all of its ethical force, precisely because the plaintiff, far from wanting the defendant to mind his own business, in fact hopes to share in the gain from the activities in which the defendant is engaged. To put the point most vividly, the patient who asks a physician to perform complicated surgery upon his person would not be satisfied if the physician honors his autonomy by not touching him at all. Given the shared benefits of the joint enterprise, it is entirely reasonable that there should be shared costs, of which the price for service is but one. In many, but by no means all, cases the plaintiff will have assumed the risk of some of the miscar-

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rights instead of liability rules. As for me, I think that there is little, if anything, to be gained from this redescription of the immunity problem, and nothing in Mashaw's own analysis demonstrates the superiority of his terminology. In addition, something may be lost because the modern terminology fails to distinguish between the questions, What does X own? and What are the conditions under which Y may excuse or justify its destruction?

3. For a more detailed statement and defense of this position, see Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. BAR FOUND. RES. J. 87 (1976), 96-107; Epstein, *Crime and Tort: Old Wine in Old Bottles*, in ASSESSING THE CRIMINAL: RESTITUTION, AND THE LEGAL PROCESS, 231, 243-47 (1977).

4. *See* Spano v. Perini Corp., 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969), where the New York Court of Appeals resolved a long and tortuous history by holding that the uniform strict liability rule applies in all blasting cases, whether the damage is caused by concussion or direct physical invasion. The issue of affirmative defenses aside, there is no reason to limit the proposition to blasting cases.

riages of their joint venture, if only by an implied-in-fact agreement; and where that is the case, the strict liability rule must yield its place to a rule that holds the defendant liable only for that harm which he could and should have prevented by the exercise of reasonable care.

With consensual relationships, therefore, the task is not to develop a set of tort rules to be imposed upon the parties to a lawsuit quite without any reference to their consent;[5] it is instead to approximate the risks which each of the parties would have assumed if they had reached an express agreement allocating them. The task in consensual relationships is thus much more fluid than it is in the case of strangers, and because of that fluidity it is impossible to form any general theory which will tell us what liability rules people will choose for themselves in certain (broadly drawn) generic situations. In some consensual relationships the negligence rule has emerged as the basis of liability, and I have no desire to quarrel with that determination here.[6] Yet it should be understood that in certain other relationships, such as that between the maker and consumer of foodstuffs, a strict liability rule has been preferred,[7] usually on the grounds that the defendant retains sufficient control over the manufacturing process to minimize the risks, and a sufficient number of separate sales to spread those risks effectively among its customers. Making the choice between negligence and strict liability in these consensual relationships is perhaps the most difficult unresolved problem of basic tort theory.[8]

II

How, then, do these observations relate to the general theory of official immunity? I believe the answer has two separate strands. First, the broad range of cases lumped together under the rubric of tort law requires us to

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5. Holmes was not thinking of physical harms arising out of consensual arrangements when he wrote, "The liabilities incurred by way of contract are more or less expressly fixed by the agreement of the parties concerned, but those arising from a tort are independent of any previous consent of the wrong-doer to bear the loss occasioned by his act." O.W. HOLMES, JR., THE COMMON LAW 77 (1881). My point is borne out when, later in the same paragraph, Holmes treats assault, slander, and conversion as the paradigm torts. It should also be noted that the modern expansion of liability has taken place mainly in products and malpractice cases, most of which originate in consensual relationships.

6. One example is the general rule for visitors to business or residential premises. *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Note that the earlier rule, easily defensible on commonsense grounds, required the owner of residential premises to warn his gratuitous guests only of known but concealed dangerous conditions. The traditional rule could be regarded either as the definition of reasonable care for a broad class of cases or as a lower standard of care for owners of residential property.

7. *See, e.g.*, U.C.C. § 2-318, where the rule is not subject to variation by express agreement.

8. Thus, why is it best in the law of products liability to treat design-defect cases as negligence cases and quality-control cases as strict liability cases? *See, e.g.*, Volkswagen of America v. Young, 272 Md. 201, 321 A.2d 737 (1974). *But see* Cronin v. J.B.E. Olsen Corp., 8 Cal.3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

recognize that a single rule of immunity is not necessarily appropriate for the many contexts and ways in which public officials act. Second, the foregoing distinctions suggest a possible classification for official conduct. The private law becomes a source of analogy, a useful but by no means infallible guide.

On the basic question of immunity Mashaw's original observation is beyond dispute: there are too many ways in which public officials are able to inflict harm upon individual citizens.[9] For the purposes of this discussion, I think, it is profitable to note that the cases fit, if roughly, into three classes. A couple of examples will suffice for each class:

1. *Passive plaintiffs.* The government is engaged in the development of a dam, and in the course of blasting, its workers throw stones upon the land of a nearby farmer, causing damage to the farmer's person and property. The Air Force operates a jet plane which creates a sonic boom that destroys the plaintiff's house, located some distance away.[10]

2. *Participating plaintiffs.* A government physician commits acts of medical malpractice which result in harm to an enlisted soldier.[11] A civilian supervisor of a government construction site fails to take the customary safety precautions, and therefore one of his workmen is injured.[12]

3. *Quasi-judicial defendants.* A public official wrongly refuses to permit construction for environmental reasons. The Food and Drug Administration (FDA) refuses to allow a new drug to enter the market, or alternatively, allows a drug to enter the market which is later proved to be unsafe and is withdrawn.

How should we deal with these three classes? In the first the plaintiff is a passive party who is hurt even though he neither sought nor hoped to receive any particular benefit from the government or its officials. In one sense, of course, no plaintiff is ever a stranger to the government, except perhaps a shipping vessel in international waters that is injured, say, by a sonic boom. Yet I think that this observation claims too much, as it is clearly possible to distinguish between the individual in his private capacity and the individual in his role as citizen of the state. The same distinction is drawn whenever a corporate shareholder who is injured by a company vehicle is permitted to bring a tort action in his individual capacity against the corporation in which he owns stock;[13] and even though much importance should be attached to the distinction between a corporation and the state, that distinction appears to be of no importance in this particular context. If, then, it makes sense to speak of the individual in his private capacity as a stranger to the government, it is

9. Mashaw, *supra* note 1, at 8, 10-13.
10. Laird v. Nelms, 406 U.S. 797 (1972).
11. Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965).
12. Garner v. Rathburn, 346 F.2d 55 (10th Cir. 1965).
13. *See* H. BALLANTINE, CORPORATIONS § 143 (rev. ed. 1946).

difficult, if not impossible, to see why the official (or for that matter, the government) should stand on a special footing with respect to the injured stranger.[14] The aggrieved plaintiff should of course be required to contribute his fair share to the common welfare, given (so we shall assume) that he shares the benefits of productive government activities. But the point is that his contribution should be reflected, not in the fortuitous extent of the damage inflicted (be it by blasting or flying), but rather in that portion of his taxes or user fees that support the government activities. We could use a rule of negligence in situations like these, but to do so would be to invoke a partial and unprincipled form of immunity by a departure from the general rule that rightly requires the individual defendant to compensate the plaintiff even in the absence of the defendant's negligence.[15]

Before moving on, we must ask, Is there something so special about the official's status that justifies a departure from these basic considerations? Here neither the government nor its officials should be allowed to plead that their activity is for the benefit of all in society. That claim is also true in most situations where the blasting or flying is done by private individuals for private gains; and in both cases there is good reason why those who benefit should pay. But public benefit does not justify taking property without compensation, and here too it cannot justify inflicting harm without compensation. Both the state and the individual official should be liable, though, of course, the government should indemnify all officers who act in accordance with their instructions.[16]

Again, I do not consider it a special circumstance that the government and its officials in some sense had to blast or had to fly. First, some sort of compulsion also exists for employees of private concerns who by contract bind themselves to complete their work for their employers. Second, even if a worker is compelled to complete an appointed task, much freedom may well remain in the time and manner in which he may perform it, and he can thus minimize his exposure to liability at his own expense. The arguments for the strict liability standard in the private context are therefore the very ones that apply to government officials, no matter whether they are at a high or a low level. It follows, I believe, that there should be no special form of immunity in the first class of cases.

In the second class of cases too, I think, the argument for special immun-

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14. See the strong statement of K.C. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 25.08-2, which rightly attacks *Laird* on justice grounds.

15. *See*, RESTATEMENT (SECOND) OF TORTS § 519-520 (1977).

16. Mashaw is quite correct to note that the culprit is often the inability of the private plaintiff to obtain redress against the state under the same circumstances, and that it is the government's protection which, when coupled with the official's personal liability, is the source of much of the problem. Mashaw, *supra* note 1, at 27. Is there reason to retain any form of official liability if governmental liability is properly defined?

ity is weak; but so is the argument for a strict liability standard. Consider for the moment the case against a military physician for medical malpractice. Here his work is demanded by his patient, who would not be satisfied, as the plaintiffs in the first class were, with the prospect of simply being left alone. Yet the differences between the plaintiffs in medical malpractice and those in blasting accidents are accurately taken into account by the rules of liability. A government physician obtains no benefit from a supposed qualified immunity that protects actions done "reasonably and in good faith," for protection is already provided by the substantive law of medical malpractice. Given these tort doctrines, the only immunity that could make a difference is absolute immunity. Yet, since private physicians are today unable to obtain releases from their liability for negligence,[17] this immunity should not be provided to government physicians, even if their services do involve a fair measure of judgment and discretion. The services of physicians in the public sector parallel in all relevant respects the services of physicians in the private sector. The limitations upon freedom of contract that are thought, however unwisely, to be appropriate to private physicians are thus appropriate to government physicians as well.[18] Although the underlying principles of tort in this second class of cases differ radically from those in the first, special immunities based upon the official status of the individual defendant are equally inappropriate in both.[19]

It is the third class of cases—those involving quasi-judicial activities—that creates some of the greatest difficulties for both tort and administrative law.[20] In these activities the public official is required by virtue of his public status to pass upon the merits of cases pressed upon him by claimants, often in situations where the success of one party necessarily results in the defeat of another. When two private parties appear before a judge at trial, the opposition between them is quite clear and apparent. In many other cases as well, that same opposition, though attenuated in appearance, is present in fact.

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17. *See* RESTATEMENT (SECOND) OF CONTRACTS § 337(2) (Tent. Draft No. 12, 1977); RESTATEMENT (SECOND) OF TORTS § 496 B, comments e-g, j-k, at 567-69 (1965); 6A A. CORBIN, CONTRACTS § 1472 (1962).

18. It is generally accepted that in medical malpractice actions the patient's consent cannot free a private physician from his liability for negligence. *See* A. HOLDER, MEDICAL MALPRACTICE LAW 307 (1975) ("Under no circumstances does any patient ever assume the risk of negligent medical treatment"). *But see* D. LOUISELL & H. WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES ¶ 9.02, at 238-39 (1960) ("But in some malpractice cases plaintiff has been held to have assumed the risk of defendant's negligence of which plaintiff was aware" (emphasis added)).

19. Note that the special position of physicians in emergency cases does not require abandonment of this basic proposition, because there too the tort law itself lowers the standard of performance required. *See* RESTATEMENT (SECOND) OF TORTS § 296 (1965); HOLDER, *supra* note 18, at 309-11.

20. While the third class is more difficult than the other two, the most intractible problems are with police officers who have line responsibility and whose various tasks are exceptionally difficult to classify. I therefore treat the police as quasi-judicial officers, but I recognize that a much more exhaustive account of their status and liabilities is urgently needed.

Awarding a patent to one party precludes others from free use of the invention covered. Allowing the construction of a dam may hurt a person for whom it creates a nuisance. And the permission to let a firm market a drug may injure consumers if it is unsafe.

How, then, ought the question of official immunity to be resolved in these and similar cases? Thus far, with sonic booms and medical malpractice, we have taken the position that the status of the injured plaintiff is a central determinant of the appropriate liability rule; and in that connection we have drawn the distinction between plaintiffs who wish only to be left alone and those who wish to exact some benefit from a government official. In this context clear pressure is placed upon that distinction, as the applicant for a patent, a permit to construct a dam, or a license to market a drug seeks the blessing of the government. One might argue that he should therefore not be entitled to hold officials to strict liability rules. Yet a moment's reflection shows that the only reason he seeks government assistance is that the state has created a set of institutions to which he must by law turn in order to engage in his activities. In some cases these institutions are prerequisite to the activities: the intangible nature of patent rights makes them difficult to exercise unless some government agency first determines who has what property rights in any particular invention or process. But in other cases it can be argued that the government has intruded on self-sufficient activities: private parties would be able to market their drugs or build their dams without the government structure that has been imposed; they would need to deal with the government only when answering private suits for damages or injunctions.[21] With these exceptions, the parties ask for government approval only because they are required to do so. As we look at these cases, then, a first approximation suggests that the plaintiffs are passive victims and that the strict liability rule should apply. That conclusion is so far at variance with the rule accepted in the cases, which oscillates between absolute and qualified immunity, that we must ask where we have gone wrong in the argument.

The isolation of this third class of cases suggests, as Mashaw's paper does, that there may be a modicum of good sense in the much-maligned distinction between governmental and proprietary acts, however difficult it may be to draw the line between them.[22] And if those terms are not quite to the pur-

21. The suit for an injunction is a very close parallel to the suit for damages, because the two types of error discussed in the text accompanying note 25, *infra*, are quite prominent in both. Indeed one of the major blunders of modern regulatory policy is that it has made the ban—the public equivalent of the injunction—the remedy of course instead of reserving it for cases of imminent or irreparable harms, as the tragic proposed ban on saccharin well illustrates.

22. I draw that line somewhat differently from the way in which it has been traditionally drawn. Thus, even though the state has been traditionally entrusted with the education of the young, I think that such functions should be treated as proprietary, because they could be discharged as well by private parties, under agreement either with the parents or the state. The essence of the governmental side of the line is the quasi-judicial decision, with a possible exception for the functions of police officers, as explained in note 20, *supra*.

pose, it might be possible to take refuge in yet another familiar distinction, that between mandatory and discretionary actions. The precise words are not important. The point is that the traditional rules of tort accountability simply do not work well when an official of the state is required to exercise discretion in a peculiarly governmental capacity. The question thus still remains, When officials act in quasi-judicial capacity and are charged with an inescapable discretion, what set of monetary rules should be used?

Thus far we have treated the immunity of public officials as derivable from a systematic application of private-law principles. The official has been treated as though he were just another private person in relation to the plaintiff, and his status as a state employee has been taken into account only in his legal relationship to the government. Yet it is quite clear—extreme libertarians notwithstanding—that the state does not stand to private citizens as private citizens stand to each other, and it is equally clear that public officials must partake of that special status. The difference is of course that the state has a unique duty to resolve citizens' disputes that are not of its making, and a corresponding exclusive right to use force against citizens without the usual justifications of consent or self-defense. While the state's status has an analog in private law (as I shall presently show), it could not be achieved strictly and solely through agreements permitted in private law.[23] Government officials, in carrying out the state's unique duties and implementing its exclusive rights, occupy a status that no private citizen could attain. While the status of the aggrieved party indicated the rule of liability that was applicable to the first two classes, we must look to the official's status to determine the liability for the third class of cases.

Our inability to toe an uncompromising private-law line does not require us to reject all insights that the private law may give us. My own instinct, therefore, is to look first at analogous private institutions that raise the same problems of decisionmaking, and to see what status is accorded to the persons who must make the decisions. To take one example, the closest parallel to a judge is, of course, the arbitrator given binding and conclusive power by private agreement to resolve a dispute. Here the uniform expectation is that the arbitrator cannot be held liable at the instance of a disappointed suitor who persuades some higher authority that his own version of the case is indeed correct. Indeed, even appeals to judicial tribunals are strictly limited, often to jurisdictional issues.[24] We can see how the economic interests on all sides of a

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23. The failure to confront the evident tensions between his historical theory of justice and his account of the origins of the state (which understates the role of nonconsensual coercion) is the major weakness, I believe, in Robert Nozick's *Anarchy, Utopia, and the State* (1974).

24. Here the principles are the same whether there is a challenge of the decision by the arbitrator or a suit against the arbitrator, even though it is quite clear the challenges to decisions are much more tolerated than personal actions for damages against the arbitrator. Think only of the comparison to judges.

private dispute immediately demand the arbitrator's insulation from liability. The disputants have some control over the process by their choice of the arbitrator and the rules under which he arbitrates. If his performance is poor, he need not be reappointed. And the fees that must be paid to cover the arbitrator's costs of possible damage awards and legal expenses make the prospect of legal sanctions against the arbitrator most unattractive to all concerned. I have not made an empirical study of the question, but I should think that few arbitration contracts are without protective language for the arbitrator or that any contract silent on the matter would be construed to hold the arbitrator personally and strictly liable.

The question then arises what form the relaxation of liability should take; and here (as with the consensual relationships we use as a guide) no solid rule, of either immunity or liability, is uniformly preferred in all cases. In arbitration the parties themselves will try to choose that rule which will minimize the total expected costs of error. As ever, the possible errors are of two sorts: allowing liability where it should not be allowed, and disallowing it where it should be allowed. Any rule that guards against one form of error will increase the possibility of the other type of error. The optimal balance must be struck, but there is not necessarily a presumption that one of the extreme solutions will not attain that balance.[25] Note in particular the possible solutions to the problem of arbitrator's liability.[26] A rule of absolute immunity would protect an arbitrator from all groundless suits that could be brought by disappointed applicants, and thus totally shut off one type of error. Yet it would provide no protection to the disappointed party who is the victim of corrupt or malicious behavior or of a decision that exceeds the arbitrator's jurisdiction. Yet leaving these two areas open to review would increase the likelihood of the other type of error, by permitting a dishonest disappointed party to attack a proper decision. Note, too, that a rule which permits review in these two areas only, shares with the absolute immunity rule the defect of not permitting challenges to decisions that are made not only mistakenly but negligently. Yet to allow challenges on grounds of negligence as well is clearly to ask for trouble from a different quarter, because all judgments that deal with unquantifiable and uncertain factors can be questioned on a negligence standard.

How, then, are we to decide? Here there is no certain answer, because our choice of rule depends upon how much of each type of error we expect

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25. Indeed, Learned Hand's opinion in Gregiore v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), takes the extreme position on precisely those grounds, with full knowledge of the two types of error involved. The more modern view is critical of that position, having more faith in the ability of courts and juries to ferret out worthless suits on a case-by-case basis. See K.C. DAVIS, *supra* note 14, ch. 26 for an attack on both *Gregiore* and Barr v. Matteo, 360 U.S. 564 (1949).

26. I ignore here, as does Mashaw, other techniques for controlling error, such as requiring the losing party to pay the legal costs of the winner.

under alternative rules. In the private context, where the choice of arbitrator is closely controlled and where loss of the reputation for fairness would be extremely harmful to the arbitrator, the general fear of either negligence or malice or even of jurisdictional error, may be small indeed. The absolute rule may therefore commend itself to all concerned, particularly as it minimizes administrative costs. The persistence of the absolute immunity doctrine in favor of judges which provides immunity from both common-law causes of action[27] and actions brought under section 1983 of the Civil Rights Act[28]—is a clear reflection of the general view that the extreme solution of absolute immunity is indeed the correct one with judges. Private selection of arbitrators is replaced by public selection of judges, but the constraints on judges are about as strong as those on arbitrators, even if their source is different. And, as Mashaw notes,[29] the absolute immunity rule quells a justifiable fear the private parties will sue a judge not primarily to collect damages but to disqualify him from a case or (the possibility cannot be dismissed) even to intimidate him.

The case for absolute immunity appears murkier as we move to other types of public officials. With public prosecutors, for example, the case for absolute immunity is clearly weaker than it is with judges. Prosecutors make many decisions that are hidden from public view, and are often subject to political influence and pressures. Yet the possibility of abuse on the other side—that of accused criminals bringing tort actions against prosecutors as a routine part of their defenses—makes absolute immunity imperative, even if distasteful.[30] Adaptation of absolute immunity is of course made more difficult by the fact that some prosecutors are vastly more inclined to abuse their office than others. Some subcategorization of prosecutors (and indeed all other types of public officials) would be welcome, but it is not within judicial power to formulate one rule for some prosecutors and another rule for others. The entire class must receive the same treatment in spite of the wide variation in behavior of its members—a fact which highlights the serious weaknesses of all uniform rules, including that of absolute immunity.

With other types of quasi-judicial officials absolute immunity also seems preferable to liability. The degree of judgment required in reaching the appropriate rule for each case is of course substantial. But immunity is usually appropriate, since the aggrieved party, though denied suit against the given official, is still entitled to appeal adverse decisions. The possiblity of official malice and abuse of power should not be underestimated, as government agencies can retaliate in a thousand ways against firms who challenge their

27. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).
28. 42 U.S.C. § 1983 (1970). *See* Pierson v. Ray, 386 U.S. 547 (1967).
29. Mashaw, *supra* note 1, at 29-33.
30. Imbler v. Pachtman, 424 U.S. 409 (1976).

decisions in the judicial forum. But the alternative hazard, which subjects all agency officials to an endless procession of depositions about the accuracy of their decisions and purity of their motives, is even more frightening. There should be no official immunity whatsoever for the government official who improperly inspects a batch of bad drugs. Yet by the same token, there should be total immunity for the FDA official who refuses to approve a new drug application.

The last class of officials upon which I shall comment are school teachers and administrators. Here the recent trend has been to provide these parties with only a qualified immunity when they act reasonably and in good faith.[31] The case for such a rule rests upon the possibility of abuses of authority by educational personnel, which may be great in some school systems although slight in others. Yet this possibility must be set off against the major breakdowns in school discipline that have been so commonplace today. Qualified immunity may protect some students from improper disciplinary treatment, improper changes in class assignments, or (occasionally) physical abuse. Yet it also hinders the efforts of teachers and administrators to protect other students from threats to their personal security and interference with their education created by an unruly few. The elimination of liability would not preclude the possibility of informal parental pressure or of direct administrative review of official misconduct. I have little doubt that within the private sphere protection against virtually all suits would be agreed upon by contract; though not without misgivings, I find the same result appropriate for public-school officials as well.

This brief survey of some common immunity problems indicates how difficult it is to offer any firm account of official immunity. Some generalization is of course necessary, and all overgeneralization should be avoided.[32]

III

There are two other points about Mashaw's paper that should be briefly noted.

First, we must consider his suggestion that the appropriate method for disciplining public officials rests not in full common-law liability for negligent acts but in the forfeiture of a portion of an officer's salary to those injured by such acts.[33] There are, I think, several problems with this Solomon-like effort to keep all parties satisfied by splitting the difference. In the first place, it has little or no precedent in the private sphere, which leads me to expect that it will not yield the efficient solution when applied to the more difficult problems of employee control in the public sphere. Second, the scheme could

31. Wood v. Strickland, 420 U.S. 308 (1975).
32. For a rundown on the recent law, see K.C. DAVIS, *supra* note 14, ch. 26 (1976).
33. Mashaw, *supra* note 1, at 34.

never rely upon the plaintiffs' initiative, because the paltry sums to be won would rarely offset the great costs of ferreting out official misconduct in quasi-judicial contexts.[34] Third, I doubt whether senior officials in any government department would be willing to assume responsibility for this form of social control, given that it requires a much more formal, public, and explicit determination of right and wrong than any of the other sanctions (*e.g.*, promotion, reassignment) which can be imposed, even in this gilded age of due process, at will and in quiet.

Last, there is the troublesome question whether Mashaw's system would create the correct incentives. Mashaw has demonstrated that the standard tort rules of full damages are probably not optimal, given the other incentives that work upon officials. If officials are exposed to full tort damages, they may take excessive steps to avoid them (such as resigning though qualified to do the work or overinvestigating at public expense) because they are unable to capture benefits equal to the losses to which they are exposed.[35] Scaling down awards by making them proportional to an official's salary may frustrate the ideal of full compensation (at least where the state itself is not liable), but Mashaw hopes that it will correct the gross imbalance between costs and benefits that would otherwise perversely influence the behavior of officials whose immunity is removed. He thus hopes to counterbalance one dubious incentive with another. The problem is that it is impossible to know what percentage of salary to withhold for each possible infraction by each official in order to right the imbalance. Given the other partial deterrents to substandard official behavior, absolute immunity coupled with informal internal sanctions may create in aggregate the best set of incentives. The question is at any rate empirical, and one for which old evidence becomes quickly stale as personnel and problems change. The system would cost large sums to implement, and the presumption should therefore be against it, absent better evidence of its strength. Direct review of an agency's regulatory decisions is, after all, a limited control whose strength should not be ignored.

The last point that Mashaw mentions—the cause-of-action question—also needs some brief comment. Mashaw is quite right to note that once immunities are eliminated, the private cause of action may still be difficult to frame and prove in many suits against government officers.[36] The problem

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34. I think, moreover, that Congress recognizes which other statutes have small damage awards (such as truth-in-lending statutes), and sweetens the pie by awarding the plaintiffs attorneys' fees, or by specifying minimum damage awards in excess of actual damages for each violation.

35. The parallel in medical malpractice is that a physician who saves one hundred lives but negligently loses one will find himself the poorer for his efforts if he must bear the full brunt of the adverse results while capturing only a small portion of the benefits through fees. The physicians' impulse is to limit liability as Mashaw proposes here. The judicial preference is for table-stakes poker, and fees will have to rise to cover the losses.

36. Mashaw, *supra* note 1, at 29-33.

confronts prospective plaintiffs at two levels: first, there is the necessity of finding statutory authority for a tort action in addition to, say, criminal fines or departmental discipline—a question on which the usual techniques of statutory construction bear but limited fruit. The recognition of the private cause of action, far from ending the tort problems, only ushers in a second complex of issues, as the parties must now litigate all elements of a very complicated case. The causal questions presented by these novel suits, in particular, are apt to be of exceptional difficulty where the complaint is not that the public official himself did direct harm to the plaintiff but that he failed to take appropriate steps to prevent others from so inflicting that harm. Where the cause of action states that the government official failed to inspect certain drugs for possible toxicity, the causal case will require, first, that the uninspected drugs caused the damage in question and, second, that the proper inspection would have alerted public authorities to the lurking dangers. Likewise, suits that complain of improper delays in processing applications for new construction raise massive difficulties in apportioning loss between administrative delays, the unsoundness of the original business conception, and other independent events, which can range from unanticipated competition to drought or flood.

Having said all this, I think that Mashaw is wrong if he supposes that these causal complications will preclude suits against governmental officials charged with discretionary functions. One of the most distinctive features of the new generation of tort causes of action is that all of them require proof of incredibly complex causal chains. Indeed I, for one, have argued that these causal complications in informed-consent cases, for example, should counsel courts to limit the basic cause of action to cases in which the physician has acted in bad faith.[37] The courts have not, however, attached great weight to such administrative arguments, holding instead that arguments about the byzantine structure of the plaintiff's causal case are properly addressed to the jury.[38] There is no reason to think that if the official-immunity aspect of liability cases were eliminated, courts would or should take a different view on causal matters when the defendant is a public official and not a private party.

CONCLUSION

The central theme of this brief article has been the extent to which private-law models of individual obligations can be used to aid in clarification of the proper scope of special immunity for government officials. Where those officials act in ways that replicate the conduct of private parties, there seems to be little justification for any form of special immunity, be it absolute

37. As by me on the "informed consent" cases: see my *Medical Malpractice, supra* note 3, at 127-28.

38. *See* Davis v. Wyeth Laboratories, 398 F.2d 1264 (5th Cir. 1974).

or qualified. The applicable principles of tort law should govern, and these should ideally reflect a distinction between activities that cause harm to strangers and activities that cause harm to persons with whom the government official has had some prior consensual arrangement.

There is, however, a third class of cases in which the simple private-law models break down. From the plaintiff's side, discretionary administrative acts involve a form of unwanted government intrusion. From the official's side, discharge of public duties can be performed only with the protection against suit that private corporate officials, for example, can and do obtain from those whom they serve. The two models of tort therefore point in very different directions. In these cases of mandated discretion and control, no rule of liability or immunity can in the nature of things be entirely satisfactory across the broad range of cases. Pressing empirical questions about the possible effects of different liability rules further cloud the entire discussion. We are thus left with the dubious task of attempting, largely by resort to private analogies, to construct hypothetical bargains between individuals who cannot contract for themselves, all in the uncertain pursuit of unified incentives that help control official abuse without unduly hamstringing public diligence. We should not envy, or quickly criticize, the courts that must strike the balance.