

DISCUSSION*

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* This discussion has been extracted and edited from a verbatim transcript of the seminar proceedings. Each participant has been provided with a copy of the edited version and the opportunity to make corrections in it.—Ed.

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I

RESPONSE TO COMMENTARIES

MANNE. To begin today's program on the subject of civil liability of government officers, I'd like to call on Professor Jerry Mashaw, of Yale Law School, to respond to the commentaries on his paper.¹

MASHAW. Thank you, Henry. I am indebted to Henry Manne for many things, including a little magazine clipping he sent me to illustrate the importance of civil liability for government officers. It reported on a small town in Kansas that had just gone out of business. The town managers, who were elected officials, had discovered that under section 1983 of the Civil Rights Act² they were potentially liable for violations of people's constitutional rights. They had therefore asked an insurance company what the premium would be on an insurance policy to cover their liability for such violations. They discovered that the insurance premium would exceed the total budget of the town. They thereupon disbanded the town by forfeiting its charter and took up a collection for the maintenance of the only public service that was really important to anyone: the street lights. So even though our topic is the civil liability of officials, this piece of casual empirical information illustrates that it also includes the ability of government to do its job.

As I read the commentators' papers and began to grasp what they were saying to me, I realized that each of them would like me to discuss the operation of official immunity under two or three—in some cases six or twelve—different hypothetical conditions. Mancur Olson³ wants to know how the nature of government-produced goods affects the operation of civil liability. Ken Shepsle⁴ wants to know how liability will affect different government decision

1. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, LAW & CONTEMP. PROB., Winter 1978, at 8.—Ed.

2. 42 U.S.C. § 1983 (1970).—Ed.

3. Olson, *Official Liability and Its Less Legalistic Alternatives*, LAW & CONTEMP. PROB., Winter 1978, at 67.—Ed.

4. Shepsle, *Official Errors and Official Liability*, LAW & CONTEMP. PROB., Winter 1978, at 35.—Ed.

procedures that have differing probabilities of error. Bill Baxter⁵ wants to know what the sovereign-immunity rule is and how government bureaus will respond to variations in that rule. Richie Epstein⁶ wants to know which government functions should be covered by official immunity and what the standard of official liability should be. Well, to discuss all of the permutations of these conditions would require a paper considerably longer than the one I had in mind—and, indeed, longer than the Liberty Fund is prepared to fund.

Let me just make some brief comments about each commentator's paper. They had the good grace not to comment directly on mine. But having left the South for New Haven and abandoned Southern ways, I will attack.

Mancur Olson's paper leaves me puzzled. He, unlike Bill Baxter, says that I can talk about official immunity without talking about sovereign immunity and, what's more, that the distinction between the two should be even sharper than the one I drew.⁷ Yet the framework he suggests for the analysis of official immunity appears to be appropriate only to sovereign immunity. Mancur's analysis rests on the proposition that the public nature of goods produced by the government makes it difficult to evaluate a particular official's output, and therefore difficult to impose civil liability on individual officials.⁸ Yet the proposition that it is almost impossible to evaluate officials' performances simply does not comport with my experience of how government agencies monitor their employees. Employees in the public sector can be monitored by piece rates, which measure inputs: agencies can measure how many cases each employee takes on, for example, rather than attempt to measure the social value of each employee's output. The difficulty of evaluating government output only affects the enterprise as a whole, as it attempts to place the social costs of its activities in equilibrium with the social benefits. This is why I find Mancur's analysis at odds with his statement that government-enterprise—that is, sovereign—immunity should be ignored.

Ken Shepsle's paper suggests something that is highly important: government officers are going to make errors, and our concern is what sort of errors we want them to make. But the liability rule that I talk about in my paper does not address the tradeoff between the different types of error that occur once errors have been reduced to their lower boundary: my liability rule addresses the question whether errors have even been reduced that far. What it attempts to decide is whether an official's conduct is unreasonable. And one definition of unreasonable conduct is conduct that exceeds the level of error that is permissible because it is inevitable, given the difficulties of specification

5. Baxter, *Government-Enterprise and Private-Enterprise Liability*, LAW & CONTEMP. PROB., Winter 1978, at 45.—Ed.

6. Epstein, *Private-Law Models for Official Liability*, LAW & CONTEMP. PROB., Winter 1978, at 53.—Ed.

7. Olson, *supra* note 3, at 69.—Ed.

8. *Id.* at 71-73.—Ed.

and inference that Ken quite correctly points out. In the terms of Ken's illustration,⁹ an official whose errors lie on the *ab* frontier should bear no liability for the harms he causes; it is the official whose errors lie at point *c* who is deemed liable by this rule.

This brings me to Bill Baxter's paper, which suggests that official liability requires second-guessing of official decisions.¹⁰ The liability rule I have just outlined is formulated precisely to avoid second-guessing. It is a test of reasonableness: once it determines that a decisionmaking scheme is within the zone of error that can reasonably be expected, it doesn't question specific decisions. I think that courts continually make that sort of determination outside of the context of liability for damages in the traditional forms of judicial review.¹¹ One of our requirements for administrative legitimacy is that administrators and bureaucrats be subject to precisely that sort of review.

Bill Baxter suggests that the problems of second-guessing that he discusses are analogous to the cause-of-action problems that I discuss:¹² in fact, the two issues are somewhat different. Second-guessing is one of many cause-of-action problems: parties affected by official decisions cannot specify legal duties owed them by the decisionmakers that would justify legal action; and in the absence of such legal grounds, judicial review would be mere second-guessing. But there are other problems with causes of action against officials, including problems of determining damages and causation, which go beyond the problem of second-guessing.

Richie Epstein has produced an intriguing formulation of the categories of official activities. He classifies official activities as either quasi-judicial or non-quasi-judicial; this is, I think, a new statement of the distinction between governmental functions and proprietary functions, and it is at least as troublesome.

The distinguishing feature of quasi-judicial decisions is that they choose between competing interests. Epstein characterizes the decision to grant a

9. Shepsle, *supra* note 4, Table at 41.—Ed.

10. Baxter, *supra* note 5, at 49-50.—Ed.

11. When the participants speak of "judicial review" they are referring to the process by which a party injured by a government agency may seek judicial review of an administrative decision after the administrative remedies have been exhausted. The Administrative Procedure Act, 5 U.S.C. § 702 (1976), is a blanket provision for judicial review of agency action. In addition there are specific review provisions such as the one in the Federal Trade Commission Act, 15 U.S.C. § 45c (1976), which states, "Any person . . . required by an order of the Commission to cease and desist . . . may obtain a review of such order in the circuit court of appeals . . . [T]he court shall have jurisdiction . . . to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed . . ." The review procedure can provide only equitable relief unless an action for damages has been established by statute.

Final judgments of a court of appeals proceeding to review agency decisions are reviewable by the Supreme Court on a writ of certiorari. 28 U.S.C. § 2350 (1970).—Ed.

12. Baxter, *supra* note 5, at 50-51.—Ed.

permit for the building of a dam as quasi-judicial;¹³ and I agree that such a decision chooses between competing interests. But I think that competing interests are also at stake in the sonic boom case, which Epstein offers as an example of non-quasi-judicial activity.¹⁴ Somebody decided where to fly the airplane that creates a sonic boom; and that decision required tradeoffs among speed, directness of route, fuel savings, and potential harm to citizens. A serious problem of characterization arises in this case. Is it an injury to an uninterested party or a choice among competing interests? And the decision whether to hold officials liable hangs on this characterization.

I am not sure how to resolve this problem effectively. I think it might be fruitful to ask what opportunities the plaintiff had to become a participant in the decisionmaking process rather than a stranger. To what extent did constraints on the decisionmaking process enable the plaintiff to negotiate in support of his interests? I suggest that it may be inappropriate to relax immunity rules in decisions of that kind.

II

DEVELOPMENT OF THE IMMUNITY DOCTRINES AND THEIR EXCEPTIONS

ORDESHOOK. I am interested in an explanation of how the doctrine of official immunity came about and why the exceptions to it are made.

A. Development of the Official- and Sovereign-Immunity Doctrines

BAXTER. Let me give a two-minute history in response to Peter Ordeshook's question. It begins in England a number of centuries ago, at a time when the country was ruled by an individual sovereign. At that time the expression that the king could do no wrong was used in a very paradoxical way. If one of the king's agents burned down a house, the courts reasoned by a strange syllogism: Burning down a house is a terribly wrong thing to do; the king can do no wrong; and therefore, the agent was not acting for the king. By this syllogism the governmental character of people who committed wrongs was denied, and this denial rendered them liable to suit like anybody else.

In the change to an institutional government the sovereign immunity, which in England attached only to the person of the king, was enormously generalized. It therefore became impossible in a wide variety of contexts to sue the government. A party injured by the government could not obtain a damage remedy from the U.S. Treasury. However, he could still sue government officials in their private capacities by naming them personally rather

13. Epstein, *supra* note 6, at 56.—Ed.

14. *Id.*—Ed.

than by title. His suit merely had to fit within the traditional definition of private tort remedies.

That situation persisted until World War II, and for some reason it began to reverse at that time. First, the government started waiving the immunity of government as such. The most sweeping waiver was in the Federal Tort Claims Act,¹⁵ although that Act contained a specific exception for so-called discretionary functions,¹⁶ which remained immune from liability. At about the same time the courts began denying the individual responsibility of government officers, particularly those engaged in discretionary functions like the functions excepted by the Tort Claims Act. Thus, a two-way reversal took place: an opening of access of the U.S. Treasury and a closing of access to individual officials.

ARANSON. That is the historical development of the immunity doctrine. But it fails to explain why certain people are immune and others are not. My theory is that officials want to be immune, and that they are sufficiently cohesive to obtain that immunity from the government. Originally, the king could do no wrong because the king didn't want people to think he could do wrong. It was also useful to the king to permit his officials to be held liable occasionally. If my recollection of English history is correct, he used that liability as a tool, by generating suits against his own ministers. In this theory it becomes clear that immunity from liability is an exclusive public policy that one group, government officials, has imposed on everyone else.

The reason that immunity does not extend beyond the government is that the average citizen in a competitive environment may actually prefer to be liable. Liability may improve the value of his product to prospective buyers, since it insures them against certain kinds of loss. The private citizen, by contrast, may not prefer to be liable, but may lack the political wherewithal to obtain immunity. Thus, immunity simply covers those who both desire it and have the political capacity to obtain it.

B. Why Official Immunity Replaced Sovereign Immunity

MANNE. I think many of us were surprised by how recently the rule of official immunity developed in the U.S. Supreme Court.¹⁷ It is a very interesting question why the reversal that Bill Baxter just described occurred when it did. Why not a hundred years earlier?

MASHAW. My colleague Bill Nelson¹⁸ has done some work on that subject

15. 28 U.S.C. §§ 2671, 72, 75, 77-80 (1970 & Supp. V 1975).—Ed.

16. 28 U.S.C. § 2680.—Ed.

17. The opinion in *Barr v. Matteo*, 360 U.S. 564 (1959), contains the first Supreme Court articulation of the modern official-immunity doctrine.—Ed.

18. Nelson, *Officeholding and Power-Wielding: An Analysis of the Relationship between Structure and Style in American Administrative History*, 10 LAW & SOC. REV. 187 (1976).—Mashaw.

and has some evidence that the rules changed, in part, as the nature of officeholding changed. In the past officials purchased offices and were not required to keep their personal funds separate from public funds. There was therefore a certain symmetry, which no longer exists, between the appropriation of benefits and the incidence of costs. Liability rules changed, in part, because officeholders no longer appropriated the benefits of public property, and were therefore no longer expected to bear the costs.

This does not explain why the change in the nature of officeholding resulted in the absolute immunity doctrine rather than the adaptation of the traditional causes of action. For example, officials who were mistaken in the exercise of their authority were traditionally held strictly liable for intentional torts: an official who destroyed a horse or battered a citizen was strictly liable if he did so in error. As officeholding changed, it might have been possible to adapt the traditional tort rules governing these cases. The rules might have changed to allow a defense of reasonableness or good faith, or to delineate a cause of action that took into account the official's obligation to exercise what he reasonably believed to be his duty. The explanation for the absolute immunity doctrine, which goes much further, has eluded me. I don't know why the response has been excessive.

BAXTER. Let me propose another answer to the question why the rule of official immunity developed when it did. My answer is that the enormous expansion of government in the 1930's and through World War II caused the activities of government officers to resemble the activities of private individuals less and less. Officials were given increasingly wider discretion. The courts began to realize that by entering controversies over official decisions, they were second-guessing the propriety of those decisions, although they were institutionally unfit to do so. However, I am not sure that my personal hypothesis would be widely shared.

SHAPO. In response to Professor Baxter's hypothesis about a distinction between official activities and private activities, I want to cite a case that I think is still central: *Dalehite v. United States*.¹⁹ This case involved some ships carrying fertilizer that exploded and destroyed the entire dock area of Texas City. The fertilizer was bound for France as part of a comprehensive plan to aid European agriculture, and certain information had been trickling out about its explosiveness. Among the acts of negligence alleged against the government were that the bagging temperatures were too high, that the material used in the bags was flammable or explosive, and that the labeling on the bags was insufficient to warn of the dangers.²⁰

Now, I submit that these were matters that would fall within the purview

19. 346 U.S. 15 (1953).—Ed.

20. 346 U.S. at 45.—Ed.

of corporate officials in similar situations, and for which corporations would have been held liable. Yet the Supreme Court of the United States held 4 to 3 (with two justices not participating) in favor of the Government, saying that it was not liable. The Federal enterprise was not held liable though there were \$200 million in damages and no way to obtain meaningful relief from the individuals responsible—except for the private bills subsequently passed by Congress. Three very distinguished justices came together in the dissenting opinion to say that the rule of the case seemed to be that “the King can do only little wrongs.”²¹

C. The Erosion of Official Immunity: Section 1983

EPSTEIN. Bill Baxter’s history of the immunity doctrine omitted one development that we ought to mention, namely, section 1983 of the Civil Rights Act.²² Section 1983 is simply a statute which says that one can sue individual officials for violations of rights defined in the Constitution. It is thus an attack on official immunity.

The statute has been construed to exclude municipalities from direct suit.²³ This means that 1983 expands official but not sovereign liability: only the individual government officer can be named as a defendant. That is one of the reasons why local government officials have become so scrupulous, particularly since the cases of the early 1960’s. They know that they may be liable even though the sovereign itself is not.

If I were to make a bet on what the future trend will be, I would say that 1983 will generate rules qualifying official immunity for most of the usual torts. The substantive claims made under 1983 will change the official-immunity doctrine, because of the interplay of statutory and constitutional principles.

LEVINE. Section 1983 has of course been around for a little over a hundred years, although it has been widely used only since the Civil Rights Act. As I understand it, litigation under section 1983 dates back at least thirty or forty years. So how can we account for the sudden sensitivity of officials to their liability under this statute?

EPSTEIN. One of the reasons why section 1983 is much more important today than thirty or forty years ago is that the nature of constitutional claims has changed.

21. 346 U.S. at 60. Justice Jackson wrote the dissenting opinion in which he was joined by Justices Black and Frankfurter.—Ed.

22. Note 2 *supra*.—Ed.

23. A recent Supreme Court decision in *Monell v. New York City Dep’t of Social Services*, 98 S. Ct. 2018 (1978) (announced June 6) overturned the previous exclusion of municipalities from suit under 42 U.S.C. § 1983. The *Monell* case overruled *Monroe v. Pape*, 365 U.S. 167 (1961).—Ed.

DELLINGER. I think that what you're suggesting might not be clear, Professor Epstein. Section 1983 does not state its own cause of action: it merely qualifies officials' immunity to actions defined elsewhere in substantive law. As long as officials were constitutionally free to be racially discriminatory or to deny prisoners religious meetings or to suspend a child from school without a hearing, they were liable under 1983 in very few areas. It is the explosion of substantive constitutional requirements that leads to the increased impact of section 1983.

The courts are now finding themselves flooded with actions under 1983, and the Supreme Court has limited substantive causes of action in response to the overuse of 1983 in recent due-process cases.²⁴ So there is interplay between the immunity doctrine of section 1983 and the substantive law.

SHAPO. Section 1983 has indeed been interpreted to apply to a broad range of torts. That broad interpretation began in the early 1960's, when it was applied principally to cases of police brutality.²⁵ It has since been extended to cases ranging from legislative reapportionment²⁶ to racial segregation²⁷ to denials of liquor licenses.²⁸

EPSTEIN. To give another example, there was a recent decision in California which held that doctors who sit on disciplinary panels are personally subject to damage actions if they don't follow their own internal procedures.

SHAPO. But perhaps the lynchpin in the present development of official liability under section 1983 is *Scheuer v. Rhodes*.²⁹ *Scheuer* dealt with injuries inflicted in the disturbances at Kent State University. The decisions qualified the immunity of several high officials, including the governor of Ohio, the president of the university, and the commandant of the National Guard.

EPSTEIN. Under *Scheuer* the qualifications of section 1983 have altered the official immunity for discretionary functions. Sending out the National Guard to quell a riot was formerly regarded as an exercise of discretion which was protected by the judicially developed official immunity. Yet by changing the cause of action to a constitutional claim, the plaintiffs were able to circumvent that absolute immunity.

SHAPO. Do I understand correctly, Professor Epstein, that you think that

24. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976).—Ed.

25. See, e.g., *Fitzgerald v. Appolonia*, 323 F. Supp. 1269 (D.C. Pa. 1971); *Selico v. Jackson*, 201 F. Supp. 475 (D.C. Cal. 1962).—Ed. See also, Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 N.W.U. L. REV. 277, 297-312 (1965).—Shapo.

26. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).—Ed.

27. See, e.g., *Bailey v. Patterson*, 323 F.2d 201, cert. denied 376 U.S. 910 (1964).—Ed.

28. See, e.g., *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *Haaf v. Board of County Comm'rs*, 337 F. Supp. 772 (D.C. Minn. 1971).—Ed.

29. 416 U.S. 232 (1974).—Ed.

if the suit had been brought against the federal government for the acts of its employees—if the commandant, for example, had been judged to be an employee of the federal government as well as the state—the federal government would have remained immune under the Tort Claims Act because of the discretionary-function exception?

EPSTEIN. Perhaps not for the actions of the commandant. But for the actions of officials whose functions are discretionary, the government would have been immune under the Tort Claims Act. And those officials themselves would have been immune under the judicially developed immunity doctrine if the suits had not been brought on constitutional grounds under section 1983.

D. Summary: The Purpose of Liability

DAVIS. The shifts between sovereign and official immunity that Bill Baxter and Richard Epstein have just described ought to be viewed in light of the purpose of civil liability. If the purpose is compensation of the injured parties, then the proper entity to sue is the one with assets, that is, the sovereign. This is the case in most countries: the injured party sues the government directly and doesn't bother about the official. The action in the *Conseil d'Etat* in France is an example.³⁰

In the United States and England there was a very curious resistance to that process. As Professor Baxter has pointed out, that resistance took the form of sovereign immunity. The injured party was forced to sue the individual official who committed the wrong, since he couldn't sue the entity with significant resources.

Until the enactment of the Federal Tort Claims Act in 1946, the common law insisted that in the process of determining fault and damages the official responsible for an injury be the defendant. A similar rule arose in the insurance industry: insurance companies, which controlled assets and were therefore logical defendants in damage suits, resisted direct actions against themselves and insisted that liability be adjudicated between the injured party and the party who caused the injury. Although the rationale was different, the parallel suggests that the common law is unique in its emphasis on individual responsibility.

42 U.S.C. § 1983, the famous Civil Rights statute, is another indication of the belief that the offending party should be involved in the process of determining responsibility. Thus our legal system appears to focus on purposes other than compensation. Perhaps it serves the purpose of retribution by bringing the culpable party to trial; and perhaps this encourages more responsible official behavior.

30. For a general discussion of the *Conseil d'Etat*, see RENÉ DAVID & HENRY DE VRIES, *THE FRENCH LEGAL SYSTEM: AN INTRODUCTION TO CIVIL LAW SYSTEMS* 39, 45-46, 92 (1958).—Ed.

But this system is clearly contrary to the purpose of compensation, since it frequently denies access to assets that can compensate the injured parties meaningfully. So we have to weigh the social purposes served by either system.

III

THEORETICAL PROBLEMS

A. Does Government Produce Public Goods?

ORDESHOOK. The discussion of social purposes seems to fall into what I call the public-interest trap. If Peter Aranson's hypothesis is correct—that is, if there is a system of official immunity because officials want it—then we should not look to the public interest when trying to understand the distribution of liability and immunity. We should not fall into the trap of assuming that government in general—and our immunity rules in particular—serve public rather than private interests.

Take as an example Mancur Olson's assumption that governments are in the business of producing public goods.³¹ This assumption is derived from a theoretical model of the inefficiency of markets that deal in public goods. Theoretically, this inefficiency would justify intervention by the state through its powers of coercion. But it doesn't follow that the government is in fact using its coercive powers to produce or to regulate public goods. Practice doesn't follow the normative model.

I would contend that governments are in the business of providing private goods—or at least that a private characteristic of goods dictates what governments do. For example, consider the construction of highways, which are presumably archetypal public goods. What determines the supply of highways? On the one hand are the contractors, concrete and asphalt companies, and the trucking industry; on the other hand are the people whose yards the highways cross. These sets of interests, and not some bureaucrat in Washington figuring out the optimal supply of highways, dictate the supply. I suspect that supply is determined similarly in national defense, which is the classic example of a public good. Although one aircraft carrier would be the optimal supply, there are three shipyards: so we build three aircraft carriers.

So when we look at the distribution of civil liability and immunity, we shouldn't fall into the trap of assuming that it is determined by the public interest.

OLSON. Your definition of a public good seems to require that people who provide it or organize it think only of the known public interest. I shouldn't imagine that any goods meet that requirement.

31. Note 8 *supra*.—Ed.

ORDESHOOK. I am not sure that I could rigorously define the difference between public and private goods. Goods such as highways may be public in consumption but private in production. There are various kinds of benefits that occur at different points of the production and consumption of these goods.

LEVINE. I think that Professor Olson's paper is rather badly confused in these areas. He seems to think that public goods are always massive and private goods are always small, and that one can always experiment with private goods cheaply but with public goods only at great expense. But I think that the distinction between public and private goods is not that clear. For example, I can write a limerick—which is a virtually pure public good—and experiment with it by trying it out on a few people to see how they like it. Or I can engage in a one-man experiment on the effect of smoking on mortality—that is, on a supposedly private good—which will be very expensive and difficult to repeat. The public or private character of an enterprise may not affect what can be learned about how it ought to operate. Thus, the public-good character of some governmental activities ought not to affect one's view of how immunity ought to work.

In arguing that the public nature of government goods precludes knowledge of their production functions, Olson also fails to distinguish among the problems of identifying the incentives of enterprises and employees, identifying their outputs, and identifying their production functions. These are three different questions.

B. Is the Legitimacy of Government Activity Relevant to Official Immunity?

OLSON. Michael Levine seems to be saying that I should have distinguished among the questions what a government agency is trying to produce, how it should produce it, and whether it has in fact produced it. Perhaps he emphasizes these distinctions because he would like to use official liability to discourage the government from performing other functions: what a government agency is producing, rather than how much, is thus of great importance to him, since he would like to relax official immunity on the basis of that determination alone.

Levine's approach, however, would not encourage or coerce officials to carry out government policy conscientiously. Instead, by limiting or abolishing official immunity, it would require the courts to undercut decisions of the Congress and the President. This approach would fundamentally change the roles of the various arms of our government.

But I think that official liability is a poor instrument for this purpose. We would all agree that government intervention is sometimes mistaken and foolish. We would probably disagree intensely on how often inappropriate

government intervention occurs, but we would all recognize that it does occur. One of the reasons that some people suggest that official immunity ought to be abolished or restricted is their view that official liability will solve the problem of needless government intervention. Official liability is a form of judicial guerilla warfare against the government.

The first problem with this view was described both in my paper and in Professor Baxter's: enterprise liability may be better suited to this purpose than official liability. One could concede the desirability of containing the government without conceding the desirability of individual official liability.

A second problem with this view follows from Professor Shepsle's point: the government is bound to make errors one way or another. As Professor Epstein's paper argued, these errors are made in the evaluation of obscure costs and obscure benefits.³² We therefore wonder whether the courts will have any more success than other parts of the government.

So while we agree that government intervention is sometimes unwarranted, many of us question whether official liability is the best means of curbing it. We argue that the rules of immunity must deal with these activities whether they are desirable or not.

MASHAW. I do not view official liability as part of the guerilla war against big government. It is narrowly limited to cases in which one can say, without second-guessing a decision, that official action has been unreasonable and has inflicted specific harms on specific parties. Perhaps official liability limits the activity of government in certain circumstances. But it may also increase government activity and intervention when the possibilities for suit arise from government inaction rather than government action. For example, liability may increase official caution as manifested in the use of preliminary injunctions, investigation, and the like.

LEVINE. I am not sure that I was advocating judicial guerilla warfare against the government, as Professor Olson has suggested. I was saying that we should separate the problems of calculating government production functions from our feelings about what government does. If we are generally skeptical of government, then we should be willing to enable individuals who feel injured by government activities to have those activities reviewed. And this principle is independent of the problems of identifying government production functions: it rests instead on the very nature of what the government produces.

CAPRON. The important decisions about what government does are largely legislative decisions and are influenced by officials only marginally. The lawyers have told us—and I would agree—that it would be very difficult

32. Epstein, *supra* note 6, at 61.—Ed.

to use official liability to affect those decisions. We know that we are not going to make members of Congress liable for the votes they make in committees and on the floor.

EPSTEIN. I think Professor Mashaw is right when he says that official liability is not concerned with the legitimacy of government activities: a suit against the government or its officers must assume the legitimacy of the activity and inquire only into particular deviations in its performance.

If we want to wage judicial guerilla warfare against intrusive government, we must realize that official liability is only one of many possible ways. If we really wanted to encourage control of bureaucratic behavior by individual citizens, we would not do so by eliminating official immunity. We would much prefer a method used, for example, under the Environmental Protection Act of 1970.³³ That Act provides that any private party who objects to another party's construction can file a challenge, demand an environmental impact statement, and then challenge the sufficiency of that statement in the courts. The Act circumvents the standing doctrine, which says that in order to bring suit one must have a discernible injury. In effect, the Act creates an army of private attorneys general, who can institute actions without demonstrating personal injury. In addition, the discretionary-functions immunity is not a bar to influencing the bureaucracy under this Act.

Here I am making a descriptive rather than normative statement. I am simply saying that if someone were an activist citizen who wanted to influence the behavior of the bureaucracy, it would be in his interest to find an alternative to direct damage actions against individual officials; for such an alternative would circumvent the standing doctrine and the immunity for discretionary functions.

Personally, I am opposed to some of these alternatives. If I had to think of a justification for suits against officials, it would be that suits can force them to release information about the operation of the bureaucracy. To change bureaucratic behavior, I would just disseminate that information on Capitol Hill—though I am afraid that is a very treacherous game to play. The processes that are free of the standing doctrine and discretionary-functions immunity give no guarantee of deriving better information than the more limited process of damage suits. All they do is to multiply the strategic possibilities for activists without improving the information that is derived.

In fact, these strategic complications make me oppose even official liability for this purpose. While I too am appalled by most government intervention, I am a strong supporter of absolute immunity for officials engaged in discretionary functions. My reason is that we already have too many lawyers, and official liability would only increase the amount of litigation further. Most

33. Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371-74 (1970).—Ed.

people's thinking about torts is about ten years behind the times. They consider a routine automobile accident to be the typical tort case. But today tort lawyers are engaged—not in such simple cases—but in the equivalent of World War II in multiple-party litigation, elaborate discovery procedures, cross-venue litigation, and the lot. If official immunity is eliminated, each drug case—just to take my favorite example—will name every official in the Food and Drug Administration as a party defendant. The administrative complications would be enormous.

IV

ALTERNATIVES TO LIABILITY

A. What Are the Alternatives?

1. *Legislative Oversight*

SHEPSLE. Professor Epstein's comment introduces an important point. We have been looking at a very narrow notion of official liability. We have been pretending that there is nothing else to encourage bureaus to behave reasonably, that bureaus have complete discretion, and that they are not called on the carpet for errors. In fact, there are many other remedies besides official liability. One is the sponsoring of legislation that affects agency budgets and authorizations.

We should not entirely believe those people who have criticized Congress for not responding to the mandate of the Legislative Reorganization Act of 1946,³⁴ which instructed congressional committees to be "continuously watchful." Well, of course, they are not continuously watchful—God help us if they were. But there is much latent oversight conducted by individual Congressmen and congressional committees, and bureau chiefs are responsive to it. In the remainder of our discussions we ought to consider notions of immunity that allow for these alternatives.

2. *Procedural Constraints*

MASHAW. There are two major alternatives to civil liability as a means of providing incentives to government officers. The first is bargain, by which parties interested in government decisions can participate in the decisionmaking. The second is proscription—that is, internal regulations that control official behavior.

If one accepts this mode of analysis, one might immediately jump to the conclusion that the civil-liability system is extremely attractive: bargaining is

34. The Monroney-Lafollette Act, Pub. L. 70-601.—Shepsle. *Codified* at 2 U.S.C. §§ 31, 72a, 74a, 74b, 88a, 132a, 132b, 261-270; 15 U.S.C. §§ 1022, 1024; 31 U.S.C. §§ 59, 60; 33 U.S.C. §§ 525-533; 40 U.S.C. §§ 166, 174d-1 (1970).—Ed.

almost impossible, because officials are not candid; and the bureaucracy has little will to police itself through internal regulation. Civil liability therefore seems to be the only possible means for providing appropriate incentives to government officers.

However, some bureaucratic behavior closely approximates bargaining, and within certain areas of activity bureaus probably do a reasonably good job of policing themselves. First, consider the contexts in which bureaus reach decisions by bargaining. Where the bureau's mission is to make a ruling—that is, in the areas of adjudication and policy-formation—interested parties participate in the decisionmaking and may impose costs on the decisionmakers. In addition to participating overtly, interested parties can participate covertly through delaying tactics, extended presentations, and the like, which impose costs on the decisionmakers. Within these contexts bureaucrats are facing something like negotiations or bargaining. Their resources for dealing with the interested parties are not unlimited.

Next, consider the willingness of bureaus to police themselves. Bureau managers are willing to invest resources in policing the activities of lower-level officials, particularly within the core mission of the bureau. In performing the peculiar duties of their bureau, officers are bound by the manual; and they usually lack the authority to take actions not covered by the manual. So in these areas official behavior may be highly regulated and monitored.

If these assertions about bargaining and policing are true, then civil liability may not be needed to influence official behavior in policy formulation, adjudication, or the core mission of individual bureaus. It may be needed only in the residual areas—areas that are incidental to a bureau's activity or do not involve policy formulation and application. Examples are constitutional rights that are not the special charge of any particular agency, activities of decentralized officials who are difficult to monitor, and proprietary activities.

Relaxation of the immunity doctrine is taking place in precisely these situations: violations of constitutional rights and injuries caused in the performance of proprietary functions by officials not engaged in the formulation or application of policy. I therefore think that the emerging structure of official liability is about as good as can be expected: the courts have got it essentially right.

Now, we may wish to argue that civil liability is preferable to bargaining or internal policing in some contexts. This argument requires a cost comparison among the different possible means of providing appropriate incentives. And as we begin to compare the cost-effectiveness of these different means, we have to include the costs that result when civil liability creates inappropriate incentives. Civil liability has different effects on different official activities. It is very difficult to specify in advance what incentives it will present to officials. We do not understand very much about the incentive structure of bureaucracies. Officials do not necessarily respond to the policies that are elaborated

in statutes and regulations, or even to the micropolitics of their bureaus. And because of the costs of the inappropriate incentives it is apt to produce, civil liability will probably appear cost-effective only where the alternatives are either inoperative or ineffective.

3. *Judicial Review*

SACKS. Jerry Mashaw mentioned another of the alternatives to civil liability in his response to Bill Baxter's argument against judicial second-guessing. Bill Baxter had argued in his paper that the courts shouldn't second-guess agency decisions in damage suits because they are not competent to make the highly technical decisions that agencies make. In his response to the commentaries Jerry Mashaw pointed out that the courts address these decisions in judicial review³⁵ processes, and are therefore not necessarily unqualified to do so in damage actions. I would like to hear both parties expand their points on this particular alternative.

BAXTER. I didn't assert in my paper that a court is less competent than, for example, the Federal Communications Commission to make decisions about broadcast licenses. I asserted only that Congress has already addressed the question which institution is the appropriate one for those decisions. So that question has been settled, even if it has been settled wrongly. If we wish to dispute Congress' choice of the appropriate institution, the sensible solution is not to heap two forms of judicial review on the FCC. If the courts are in fact better suited to making decisions on broadcast licenses, the solution is to abolish the FCC and transfer the decisionmaking to the courts in the first instance.

MASHAW. I think that we are confusing two issues. One issue is the duplication of causes of action for essentially the same claim against the FCC. I agree with Bill Baxter that we should not have that. At the very least, if both judicial review and damage actions are available to plaintiffs, there should be some requirement for joinder of the claims. The second issue is whether any judicial remedy at all should be available. And here I disagree with Bill Baxter when he implies that providing judicial remedies entails the transfer to the courts of the decisionmaking power. I would agree that we should limit the judicial remedies to prevent second-guessing of agency decisions. But under the standard of reasonableness that I described earlier, such second-guessing would not occur. The question for the court is not whether a decision was right or wrong but whether it was within the boundaries of reasonable decisionmaking, given that the agency has been assigned the primary task of making the decision.

35. See note 11 *supra* and accompanying text.—Ed.

STEWART. I would like to ask Jerry Mashaw if he is suggesting that damage remedies would be useful in addition to judicial review in cases where an agency's action is unreasonable. It seems to me that a party disappointed in judicial review could then always make an allegation of unreasonableness, obtain wider powers of discovery, and cause long delays. Civil liability would cause all of the administrative costs that Richie Epstein mentioned earlier. And disappointed parties would be able to harass an agency in many ways that are not possible in judicial review.

MASHAW. I think that there is a modest role for damage actions in addition to judicial review. There are cases in which the traditional review does not provide redress or, moreover, sufficient incentives for the victims to seek it. Consider an FCC licensing case that goes through hearings for a number of years. By the time judicial review is reached, the disappointed applicant has disbanded his company and would find it extremely costly to regroup and take the license. In this case, the remedy offered by judicial review is not the remedy desired, and the injured party does not find it worthwhile to undertake the expense of litigation. On the other hand, damages might offer sufficient incentives to continue seeking redress.

STEWART. If it were not for the possibilities of harassment that I just mentioned, I would think that damage actions would be preferable to judicial review on other grounds too. For example, where an agency's decision cannot take effect until all the appeal procedures have been exhausted, the disappointed applicant has incentives to cause delays in the judicial review so that he can continue marketing his product or using his license. Since damage actions would only be available after the decision had taken effect, plaintiffs would not have these incentives for delay. In addition, judicial review does not make clear the social costs of erroneous government action, as damage remedies do. So in an ideal world—where damage actions wouldn't be used to harass the government—damage actions might be preferable to this particular alternative.

B. Why Seek Alternatives to Civil Liability?

1. *Problems of Valuation in Civil Liability Suits*

EPSTEIN. The problem with liability suits is the evaluation of damages. There may be data on the value of damages, but those data may not be meaningful.

LEVINE. One of the problems with any damage remedy is the need for a baseline. The court must establish a hypothetical wealth level from which the plaintiff's current wealth level can be subtracted to yield the amount to which he has been damaged. This hypothetical value is very difficult to establish in the areas of government activity.

EPSTEIN. It is hard enough to calculate damages in straight commercial cases where there has been a breach of contract. But it is even harder in regulatory cases in which the denial of a license has prevented the plaintiff from even making contracts. One can't say what might have happened if the license had been granted.

In fact, somebody could say that the denial of a license saved the plaintiff from the greatest regulatory snafu in the world. If he had been allowed to begin doing business, the Equal Employment Opportunity Commission would have taken action against him, and everything would have been lost: thank God he didn't get the license.

If damages are actually this difficult to calculate, we know that any particular calculation is likely to be wrong. Perhaps alternative procedures, no matter how bad they are, would be preferable.

STEWART. But there are similar problems of valuation in private litigation.

TULLOCK. I agree. The ordinary physical damage to an individual, which has of course been calculated for a long time, is just as uncertain as these other damages. The courts have just gotten used to being wrong. The best example is a woman whose face is damaged in an automobile accident, who attempts to recover damages for the value of her lost good looks. I would submit that this case is at least as difficult as the official-liability cases. Yet because the courts have been making that kind of error all these years, they go ahead making them. I don't see why they can't go ahead and make errors in the area of official liability as well.

LEVINE. The point is that the damages caused by government officers are different from the damages in private suits. They are different precisely because the baseline is affected by the policy of the agency involved. In areas that are pervasively regulated—which turns out to be a lot of areas these days—it is difficult to hypothesize the plaintiff's wealth level in the absence of the policy being challenged. The question is not only, What would the plaintiff have been worth in the absence of this policy? but also, What other policy would the agency have adopted in the absence of this one? Only by examining possible alternative actions can you determine the amount of the damages.

In fact, one might expect an agency to adjust its policies to minimize the impact of a finding of negligence. This is somewhat fanciful, of course—but an agency might regulate its constituents so that their property was not worth very much. This would not be minimizing the probability of losing a lawsuit—which would be desirable—but minimizing the value of what the agency will be sued for destroying. An agency regulating land use, for example, might use its regulations to make land worth as little as possible; in the event of an error, the agency could then never be sued for very much.

BROWN. I think that Mike Levine is absolutely right that valuation is a problem with damage actions. But it is also a problem in all areas of policymaking. All policymaking attempts to minimize harm—among other things. The very concept of harm involves a comparison of an actual event with a counterfactual event. And very often the counterfactual event would depend on the actions of the individual making the comparison. Antitrust policy is a classic example: it requires the estimation of market behavior under various counterfactual conditions. Thus, I do not see how valuation problems distinguish damage actions from any form of policymaking.

LEVINE. To answer John Brown's question, the reason that valuation problems are particularly important to the question of civil liability is that they account for the interest in certain alternatives to liability—and in particular, for the obsession with procedural due process. It is easy to see why the courts have focused on due process. They think that all they can do is ensure that everyone has been heard, that all the procedures have been followed. This at least creates a sense of participation.

SHAPO. Are you suggesting that procedural fairness is not important?

LEVINE. No. I am simply saying that the valuation problems attending damage actions are reasons for considering alternative review procedures. Extended review procedures can produce very undesirable results; but damage remedies may be no more desirable.

2. *An Alternative to Evaluating Damages*

DELLINGER. One solution to the problem of valuation may be to use a different basis for calculation, as Professor Mashaw suggested briefly in his paper. Rather than attempt to compensate the plaintiff for the precise value of his loss, we might concentrate on providing the proper incentives to the official. Our goal is to reduce the probability of error in official decisions—not to zero, of course, but to some optimal level. One method is to require a panoply of procedures before a decision can be made. The other is to make the official liable for his errors and allow him to decide what procedures to follow.

Viewed in this light, the problem is not how to compensate the plaintiff but how to present to the official the appropriate incentives for care. If we were to calculate the plaintiff's award on this basis, civil liability would be no more problematic than its alternatives. For example, in requiring due process, we have to decide what the proper level of process is—that is, how many procedures to require. I would suggest that this determination is no easier than the determination of the plaintiff's award on the basis I have described.

V

CALCULATING THE INCENTIVES OF GOVERNMENT OFFICERS

OLSON. So much of this discussion has failed to produce clear and constructive conflict because different participants have been proposing official liability or criticizing official liability as an answer to different questions. Is it the answer to the need for compensation for the victims of official mistakes? or is it the answer to the problem of big and intrusive government? or is it the answer to inefficiency and ineptitude in government? We haven't reached a consensus on which of these problems is most urgent and which of them official liability should address.

However, it seems that the one problem we come back to most often is ineptitude, negligence, and inefficiency among government officials. We all seem to want a better system to motivate government officials to do a good job.

A. Skewed Incentives

GOETZ. The problem with using official liability to encourage good official performance is that it distorts the incentives of government officers. Imagine a bureaucrat who performs two different activities x and y . We can think of him as trying to maximize a function whose first term is the gross benefits from each activity. The second term in the function reflects the risk that x and y will injure private parties. That risk is a function not only of the amounts of x and y but also of the care exercised in their performance. So the net benefits of the bureaucrat's activities—that is, the gross benefits minus the risks—are a function of at least three variables, the amount of activity x , the amount of activity y , and the amount of care exercised.

Our purpose is to ensure that this bureaucrat exercises the correct amount of care in the performance of given optimal levels of x and y . The correct amount of care is determined by the marginal social costs and benefits of exercising care. And an efficient level of care would be produced by sanctions proportionate to the marginal bureaucrat's costs of care. In some government activities the marginal cost of care is very high, and strong sanctions would be required to induce officials to exercise care. In other activities, however, it is almost as easy to perform carefully as to perform carelessly; relatively modest sanctions would be sufficient in these activities. In the latter case tort liability might actually be excessive.

A result of excessive sanctions in such activities is that incentives are skewed. Our purpose in designing an official's incentives is not to alter the makeup of his activities: that is, we want incentives that will adjust the officials' levels of care in producing x and y but not distort the levels at which x and y are produced. The problem is that the official bears some of the costs of exercising care but may not bear any of the consequences of adjusting x and y . Civil liability will give him an incentive to minimize his risk-producing

errors. But if he can do so by altering his level or mixture of the two activities rather than by exercising more care, he will. Though x is a very beneficial function, the bureaucrat will avoid it if it carries a substantial risk. Or assume that x and y have risks amounting to the same expected value of injury to private parties, but that x has a small probability of causing a large injury and y has a large probability of causing a small injury. If the errors caused by y are not large enough to exceed the threshold where civil suits would be justified, the official will prefer many small losses to the infrequent disaster caused by x . So he will favor activities with frequent small errors, even when the aggregate of the small losses greatly exceeds the infrequent major loss.

OLSON. I would add another term to this model. Official liability would provide government officers with incentives to exercise some kinds of care but not others. If an official did not have official immunity, he would need a method of protecting himself against damage actions. Since courts are very concerned about procedures, the official would have to be fussy about procedures. He would have to keep more carbon paper around, keep better records, and protect himself in other ways. But other kinds of care, which might not be as effective in a court defense, would not be encouraged. Conversely, only those harmful actions that are easily detectible and susceptible to proof in court would be discouraged by civil liability: equally harmful actions might not be equally discouraged.

Consider the following story: An official of the Economic Development Administration, which is charged with aiding depressed and poor areas, observed that the Eskimos near Nome, Alaska, had incomes low enough to qualify for aid under the Economic Development Act. He traveled to Nome to ask the Eskimos what they really needed. They said that since their main business was fishing, and since the outdoor temperatures occasionally rose above freezing, they really needed a giant cold-storage plant. The administrator reportedly said, "Iceboxes for Eskimos? Not a chance."

This official was probably wise to refuse this request. Given the present system of incentives—and particularly the strong incentives brought to bear on bureaucrats and politicians by journalists—it would have been a terrible error to build a cold-storage plant in Nome. This case illustrates the general rule that officials can get in terrible trouble for a mistake that is blatant or conspicuous, even if its consequences are of no quantitative significance. Officials must not act indefensibly, but they may be inefficient or ineffective in ways that are of great significance but are not easily detected.

In this way official liability would only encourage certain types of care and only discourage particular types of error.

SHEPSLE. We should add further that official liability might provide incentives for exercising too much care. Professor Mashaw correctly identified the issue by underscoring the need for "efficient care." The incentive system

we are looking for would encourage those who can most cheaply reduce errors to do so and encourage others to continue committing errors if the cost of reducing them exceeds the damage they do. For example, it might be cheaper to continue paying excessive benefits to welfare recipients who cheat than to investigate every recipient. The question in official liability is whether we are encouraging too much caution.

CLARKSON. In many cases that is not the correct question. Civil liability may in fact improve the efficiency of many bureaus that are being too careful now. For example, the Small Business Administration is directed to give loans to enterprises that have been turned down by banks as being too risky. Yet the Small Business Administration actually has a record of loan repayments that is better, on the average, than that of banks. Why? Because they are being too careful: they are discriminating too well among the businesses rejected by banks and lending only to those presenting low risk. If businesses rejected by the Small Business Administration could sue the Administration's officers, the officials would be encouraged to take more risks.

Cost-benefit analysis has been written into the law for government operations but has never been formally used in budgeting. The Office of Management and Budget's circular A-11 governs all budget decisions but has not incorporated cost-benefit analysis. Furthermore, agencies often fail to file cost-benefit analyses when they are required. Again, civil liability might modify this inefficient behavior.

MANNE. Some of these problems have led us away from the notion of official liability. One of the reasons that we are interested in official liability is that officials are not sufficiently constrained by present devices and techniques. They are often arbitrary, mean, stupid, and venal. If we can choose one of those characteristics, such as stupidity, and correct it by delivering its costs to the officials personally, it would have to be beneficial.

LEVINE. It's odd that the one characteristic you picked from the list is the one for which I suspect civil liability would be least effective: stupidity.

MANNE. Well, I had negligence in mind.

LEVINE. But if you mean stupidity rather than carelessness, civil liability is probably not a very effective deterrent.

ROBINSON. To expand on Michael Levine's point, I would like to ask how civil liability would improve the performance of officials who make simple mistakes because they are not competent to handle the task they have been given. These errors can be very, very costly. But holding the erring officials personally liable will not prevent them. More care will be taken and more information will be compiled to show that every T has been crossed, but civil liability will not produce more intelligence in addition to more care.

B. The Incentives of Sovereign Liability

1. *Arguments For Sovereign Liability*

a. Employees Do Not Claim the Benefits of Their Production

LEVINE. The issue of skewed incentives requires a comparison of the incentives for the enterprise and the incentives for the employee. Typically, an individual employee in an organization—aside from the entrepreneur—cannot capture the gains from many of his decisions. Yet if he is held personally liable for the losses he inflicts on others, he will bear many of the costs of his decisions. This is what causes the severe skewing of his incentives that encourages timidity. Perhaps we should look at the incentives of the enterprise instead: the enterprise does capture the gains of its activity, and therefore may be the more logical entity to bear the costs.

MANNE. You're wrong. Employees do in fact claim the marginal value of their productivity. There is no reason to believe, and we certainly have no data to suggest, that the market for employees of corporations doesn't work very effectively.

LEVINE. There are reasons to believe that employees cannot capture their marginal product in a carefully calibrated paycheck, particularly in organizations with large numbers of employees and accountants. There are reasons to suspect that the employee's product is not fully reflected in the market for his labor.

First, large organizations are characterized by collective production: it isn't clear how much each person contributes to the output. Secondly, the qualities of individual employees are frequently unknown, although it may be clear that a group operates well. And thirdly, large organizations cannot control their employees' behavior in detail: the employees who are responsible for hiring other employees and rewarding them for their production may do so imperfectly.

MANNE. I am not sure what to do here. We seem to be going off on a slightly different tangent.

LEVINE. Oh, no. This is quite central, Henry. You may not like it, but it's central.

b. Sovereign Liability Spreads Risks

GOETZ. Sovereign liability is preferable to official liability where there are many risky activities of an insurable type. When compared with the risks to individuals, the risks to the enterprise are slight. If a municipality is made liable, for example, for the errors of its police force, its risk costs must be subtracted from the benefits derived from the entire force. An individual

police officer might find the risk of personal liability intimidating; but the City of New York, for example, would spread that risk over the benefits derived from 25,000 policemen, and is more likely to select the combination of costs and objectives sought by the citizens. So the incentives of sovereign liability are less skewed.

2. *Arguments Against Sovereign Liability*

a. Problems of Municipal Liability

GOETZ. How would enterprise liability work with governments? In corporations the stockholders at least have limited liability, and corporations are ultimately execution-proof. But what will happen if there is a very large judgment against a rather small government unit? The people who stand in the relation of stockholders to the government—that is, the taxpayers—do not have limited liability. How will damages of this size be paid? Will the government simply go out of business?

DELLINGER. There are a number of lawsuits in which judgments were made against municipal corporations. School desegregation cases also impose costs on municipalities. Some courts have ordered increases in the property tax rate to meet these costs. Another example would be a court injunction for the improvement of a substandard jail. If the voters turn down a bond issue for these improvements, there is no provision for an injunction against individual taxpayers. I suppose a court could then order the governing body to increase the property tax rate despite the taxpayers' vote.

GOETZ. These examples are still cases of small judgments in proportion to the tax base. What about major disasters? What if a city's natural-gas plant blows up and causes \$100 million in damages?

MANNE. There goes the tax base.

EPSTEIN. Federal disaster relief would be the only solution.

LEVINE. There is no simple answer to Charlie Goetz's question about municipal liability. It raises a problem that is carefully ignored in torts classes. Many defendants are judgment-proof by virtue of the limited size of their assets. We don't have debtors' prison, and bankruptcy law provides most defendants with immunity from the ultimate execution of large damage claims. The extent to which a municipality can avail itself of this immunity is still unknown—look at the case of New York. But it certainly does limit the incentives that can be created by sovereign liability.

MANNE. The mere fact that some cases are very difficult to prove or that some defendants are judgment-proof doesn't enter into the question of what the substantive rule of law ought to be. Furthermore, I think you are ignoring

the point that many of the actions we have been talking about would be used primarily for strategic purposes, not for financial compensation.

b. Agencies Are Not Susceptible to the Incentives of Liability

MARGOLIS. When discussing sovereign liability it is terribly important to distinguish among the sovereign and its various enterprises, the bureaus and agencies. Sovereign liability often affects the U.S. Treasury and the Department of Justice. Too often a different agency of the government does the harm, but the Treasury and Department of Justice bear the costs.

I consulted with the Department of Justice to design schemes that would transfer these costs to the erring bureaus. Many of these schemes would force the bureaus to prepare all of the documentation that the Justice Department required in defending civil liability suits. The costs of documentation were significant to the bureaus, since their budgets had been set two years earlier.

We also encouraged some of the agencies, especially those engaged in land-condemnation procedures, to be much more generous. We encouraged them to overcompensate and to take excessive losses rather than risk harming private parties. This usually reduced the caseload of the Justice Department, cleared up various courts, and simplified things tremendously. But the reduction in caseload was accomplished only by the threat that the agencies would have to prepare the case documentation if they didn't reduce the number of suits.

One problem with these schemes was that the Department of Justice hated to give up its role as the government's lawyer. They liked representing the government in all of these cases. We had to make them understand that as they clung to these cases, many other important cases were being ignored. It was to their benefit to encourage the agencies to alter their behavior, and one way of encouraging them was to impose the costs of litigation on them. In part we succeeded in our arguments, the government changed, and some improvements were made.

The Justice Department is not the only department that could improve the incidence of liability costs. There are various budgetary schemes that the Treasury might use to impose the costs of damage awards on the erring bureau. Part of the budgetary allocation to each agency might be used to purchase insurance against civil liability. If surpluses were generated thereby, the agencies might be given budgetary discretion over them. This would encourage the agencies to reduce the risk of damage awards in order to obtain this budgetary bonus.

CAPRON. I agree with a lot of the things that Julie Margolis has said, but I think that his perception of the budgetary process is different from mine. I don't think that government agencies will be allowed to keep unspent money

from insurance funds in their budgets. They won't be allowed discretion over the use of that money.

SCOTT. My experience of the budgetary process leads me to make the opposite criticism. Suppose that all of the costs of liability for a major blunder were imposed on an agency. How would this affect its behavior? I suggest that it would simply ask for supplemental appropriations. In its next budget it will take certain liability-reducing measures that would offset the newly imposed expected liability costs, but a permanent change in its behavior may not benefit the employees of the agency at all.

CRAIN. The lack of incentives for agencies is indeed an argument for individual official liability. In an agency, where there is no private ownership, no individual will bear the cost of mistakes by poor decisionmakers. The cost is diffused, and each taxpayer bears a pro rata share. Stockholders in the private sector have an incentive to hire better decisionmakers, because their wealth is directly affected by the cost of mistakes.

c. *Agencies Cannot Transmit Incentives to Their Employees*

SHEPSLE. Another problem with sovereign liability is that it would not offer the same benefits as official liability unless the government enterprise has expedient ways to control its officers.

LEVINE. This is why I find the discussion of incentives discouraging in the contexts of both official liability and sovereign liability: the government enterprise can't control its employees. I don't mean that it can't keep them from running berserk through the halls. I mean that it simply cannot finely calibrate their behavior. If the enterprise is held liable, it will perhaps bear the costs of errors; but it can't control the behavior that causes those errors and needs to be modified to prevent them.

3. *Arguments Against the Comparison*

CAPRON. I think we are too ignorant about incentives to make generalizations about the entire government. We have to speak of particular agencies and particular kinds of officials. A police force is very different from the Federal Aviation Administration.

In the upper reaches of the bureaucracy, I would say, there will be no difference in incentives between official liability and sovereign liability. If an agency is sued, the appointed officials in it will still suffer: the main cost will be the damage to their reputations, and they are not going to be particularly relieved that their personal assets are not at issue. At this level of the bureaucracy other incentives will dominate the incentives of official liability. The same will not be true for police officers, however, to whom official and sovereign liability may seem to differ substantially.

HOCHMAN. I think that we are discussing the issue of sovereign liability versus official liability on very narrow grounds. The notion of official immunity reflects a larger social decision that the government should operate inexpensively by hiring risk-averse employees. This is similar to the decision of universities to pay professors less by giving them tenure. One cannot argue that the structure of incentives favors individual liability over sovereign liability without considering whether the market for government employees would change. If we impose official liability, we might also have to give the President a very large budget that allowed him to buy a Secretary of State for \$400,000 a year.

C. The Incentives of Liability Combined With Indemnification

1. *Indemnification of the Official by the Government— Does It Approximate Sovereign Liability?*

BAXTER. I do not find the problem of internal discipline to be a reason for believing that official liability will be any better than enterprise liability. An agency can always blunt the impact of official liability by indemnifying its agents. We are stuck with a certain amount of inefficiency under either system: if the agency is liable, it may fail to discipline its agents; if the agents are liable, the agency may weaken its internal discipline by indemnifying them.

The only advantage of official liability is in the unusual cases in which we want certain kinds of behavior to be totally eliminated—such as police brutality—and in which indemnification would be impossible for political reasons.

The advantage of sovereign liability lies in the compensation of those injured by the government—which we have mostly ignored. But as for the discipline of government agents, I find the two systems equally discouraging.

SACKS. I am told that the reason policemen are sued—at least in the State of Connecticut—is that the plaintiffs expect to collect, not from the policemen, but ultimately from the municipality. Either the municipality has taken out liability insurance and pays a premium on the officers' behalf, or the municipality will pay for a judgment out of its general funds. The reason that the municipality will pay these damages, I am told, is pressure from the police force. If the municipality will not stand behind its officers, even if they are guilty of willful misconduct, it will have serious problems with the force.

a. Differences of Incentives Between Official Liability With Indemnification and Sovereign Liability

DAVIS. The fundamental difference between official liability with indemnification and sovereign liability is that in the former an individual is the nom-

inal defendant. This may or may not have advantages.

One possible advantage of retaining the individual as the nominal defendant is that persons who may be more inclined to sue the enterprise may pause if they know that a named individual will be seriously inconvenienced. Moreover, unmeritorious plaintiffs may be more likely to win damages from the enterprise than when the individual is the nominal defendant. To what extent would the requirement of suing an individual official discourage litigation? To what extent would it prevent unmerited awards?

A possible disadvantage in retaining the individual as a nominal defendant is that official discretion may be unduly inhibited by officials' fear of being named in lawsuits. Even though an official may not be personally liable for damages if they are shifted to the government enterprise, it is a serious inconvenience for him to be named as a defendant. There are, above all, psychological costs.

SHAVELL. First Professors Baxter and Sacks argued that it does not make a difference whether legal liability is imposed on the enterprise or on the official, since the enterprise will bear the costs in either case. Now Professor Davis has argued that the use of official liability may make a difference, since it would cause individual officials to be named as defendants, even if they were then indemnified against financial loss. The counterargument to Davis is that, on the one hand, the individual officials would still be named under sovereign liability and, on the other hand, that if the agency truly indemnified them under official liability, it would handle all of the legal proceedings as well.

My question, therefore, is whether we can say that there is really no difference between sovereign liability and official liability. I realize that there are exceptions, such as Professor Baxter's case of police brutality. But can we equate the two in general?

b. Differences in the Compensation of Injured Parties

EPSTEIN. There would be a difference if there were official liability, indemnification of officials, and sovereign immunity. The reason is that indemnification must follow a financial loss to the official; the government could insist on paying only that amount which is paid by the official. If the individual official has net assets of \$50,000, and a judgment of \$10 billion is entered against him, recovery will be limited by the official's assets, and will therefore be much less than under sovereign liability.

This is one of the problems inherent in applying different rules of liability to the official and the enterprise. I think there is a theoretical objection to this lack of symmetry in the sovereign-liability model you propose. There are two possible interpretations of enterprise liability. On the one hand, enterprise liability could be the vicarious liability of the employer for the wrongful acts

of its servants. In that case, the underlying standards of liability for the individual are preserved, and the employer is merely named as the defendant in the case in which the individual's conduct is to be evaluated. On the other hand, enterprise liability could be analogous to products liability, that is, to a principle that an enterprise should bear the cost of all injuries associated with its operations.

I think that only one of these interpretations will be successful in application to government enterprises. If sovereign liability is interpreted as the vicarious liability of the government enterprise for the actions of its servants, then the applicable liability rules are well known and appear to be reasonably workable. If sovereign liability is interpreted as analogous to products liability, however, a number of problems arise: first, the principles of products liability are in great flux today; and, second, they would be rather difficult to apply to the actions of individual government officials.

The vicarious-liability model is attractive for another reason. One of the traditional justifications for vicarious liability was the difficulty of assigning responsibility to individual employees in certain cases in which the responsibility of some employee was nevertheless clear. One knew that someone in the enterprise was at fault, and vicarious liability relieved the plaintiff of the task of identifying which employee it was. The law simply held the employer vicariously liable for all of his employees and left him to apportion individual liability if he wanted. Official liability poses the same problems of apportionment in cases involving numerous officials. This is particularly true in discretionary functions, where responsibility may be difficult to assign. This is why sovereign liability might be viewed as solving some of the same problems as vicarious liability.

However, the application of vicarious liability to the government poses certain theoretical problems.

The rule of vicarious liability is that the principal is liable when the agent is liable; or, conversely, that where the agent cannot be held responsible, neither can the principal. Official immunity shields government agents from liability, and would therefore hinder the application of this rule to sovereign liability. But the principle behind the rule could be preserved if the agents were held responsible by their superiors: in that case, the sovereign could be made liable for its agents' actions without being asked to bear a responsibility that the agents do not.

But if the internal discipline of government agencies is incomplete, then sovereign liability would indeed seem inappropriate. Take, for example, the case of the Chicago Transit District train that ran off the tracks and hit ten people. In the course of discovery in that case it was learned that when the city considered a suspension motion against a union employee, it couldn't consider safety violations that occurred more than a year earlier. In this case the

union's contract determined the extent to which employees could be held responsible. And an appropriate sovereign-liability rule would thus have to change every time the contract changed, if it were to avoid holding the principal responsible when the agent is not.

Of course no respectable authority claims that vicarious liability is precluded if union rules prevent the city from disciplining its employees. The issue of vicarious liability was undisputed both before and after the accident. My point was simply that the appropriate rule in vicarious liability holds the principal liable only when the agent is liable, and that the combination of official immunity and insufficient internal controls should therefore make sovereign liability inappropriate. I therefore favor a combination of official and sovereign liability.

A system of official and sovereign liability in tandem would prevent the problem of indemnification from arising: the compensation available to a plaintiff would not be limited by the assets of the individual defendant, since recovery would be available from the enterprise through vicarious liability.

BAXTER. Richie Epstein's insistence on official and sovereign liability in tandem is rather peculiar. A plaintiff who is simply interested in recovering damages would sue an agency rather than an official. The only reason I can imagine for suing an official if recovery is available from the sovereign is to increase the costs imposed by litigation. Richie referred earlier to the undesirability of massive suits with many parties. Precisely for the sake of preventing them, I would be inclined to favor absolute enterprise liability and absolute official immunity.

DELLINGER. We were discussing the difference between sovereign liability and official liability with indemnification. I think that Richard Epstein noted one difference that hasn't been fully explored. If there is a system of individual liability with indemnification, many plaintiffs will lose their suits because they cannot identify the offending officer. If direct action were available against the government, it would be sufficient to show that some employee of the government is responsible for an injury. Government indemnification of officials would thus make recovery much less likely.

c. Incentives Skewed by Indemnification

DELLINGER. We keep assuming that the government will always indemnify officials if liability were imposed on them. The legislature could always decide not to provide indemnification. Or there might be imperfections in the indemnity system that led to indemnification for certain kinds of damages but not for others. This reintroduces the question of skewed incentives.

MASHAW. If the government refused to indemnify officials, they would perceive the relaxation of official immunity as a cut in salary; to the extent

that their services were valued more highly elsewhere, they would tend to seek other employment. In addition, they might be able to limit the effectiveness of the government's failure to indemnify them by avoiding activities in which liability without indemnification is likely.

2. *Indemnification of the Government by the Official—
Does It Approximate Official Liability?*

ELICKSON. These comments seem to indicate that if compensation is our goal, it makes no sense to hold the official liable, even if he will be indemnified: sovereign liability will do the job better. If bureaucratic discipline is our goal, official liability presents problems of skewed incentives, as Charlie Goetz pointed out. For example, military pilots may not defend the nation with appropriate vigor if they are responsible for damage caused by sonic booms. But at some point the deterrence benefit of official liability should exceed these costs of overcautiousness. At that point, I suggest, we ought to consider the converse of official liability with indemnification, namely, sovereign liability with indemnification. If we held the government liable, when should we also hold individuals liable by allowing the government to sue them for indemnification?

To answer that question we might look at the private sector. I suspect that corporations seldom sue their employees for indemnification when the employees have been merely negligent. For example, when the General Motors engineers designed the Corvair, they may have imposed considerable losses on General Motors;³⁶ but I doubt that General Motors would seek indemnification from them. But if a printer at the *Washington Post* smashed up its presses, I think that the *Post* would sue him for damages. Another case in which indemnification might be sought is products liability. If Coca-Cola could find the employee who put a mouse in a bottle and traumatized a drinker, I suspect the corporation would attempt to sue the employee, even if he had few assets.

We should begin to classify these cases in order to find the line at which the benefits of individual liability outweigh the costs. Perhaps the employee should be held liable for indemnification when he has committed intentional torts or been grossly negligent. In the case of mere negligence, I think the government should be liable, but not the official. Charlie Goetz has given reasons why it might be more efficient if the government did not seek indemnification in that situation.

BROWN. I am not sure that the degree of negligence should be the determinative factor. For example, the official at Westinghouse who decided not

36. See, e.g., *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).—Ellickson.

to buy covering contracts for uranium worth a couple of billion dollars³⁷ may have been merely negligent. Thus the distinction may not be useful. The distinction between gross negligence and mere negligence, as a learned judge once said, is the difference between being a fool and being a damn fool.

a. Differences Between Official Liability and Sovereign Liability With Indemnification

EPSTEIN. I should think that there is a vast difference between indemnity actions brought by employers and actions brought against employees by third parties. When an employer decides to bring an indemnity action, he will take into account the hazard of demoralizing his entire staff. He will pick his victim very carefully, and he will probably use the Ellickson test of reckless disregard of internal procedures as his standard. He could thereby justify his actions to the other employees.

But a third party who sues an employee directly would not care about the morale of the employer's staff. Indeed, the third party's incentive is the opposite: he wants to break so much china in the shop that the employer will settle with him.

b. Differences Between the Public and Private Sectors

BROWN. I would like to make one comment about the usefulness of the private firm as an analog for the government enterprise. In liability suits against private firms the judicial system merely aims to ensure that third parties are not paying the costs of inefficiency in an organization. It does not care whether the firm is inefficient or not, so long as it pays the costs of inefficiency.

We have been seeking a different goal in liability for the government. We have been trying not only to make the government bear the costs of inefficiency but also to make the government more efficient. One might argue that this is not the job of the legal system. Perhaps the legal system should just make sure that the costs of inefficiency are borne by government, and leave the organization of government to the bureaucrats.

CRAIN. Another difference between the private sector and the public sector in the application of enterprise liability with indemnification is that no one in the public sector has an incentive to identify which official is responsible, while stockholders in the private sector do. As I pointed out before, stockholders have an incentive to hire better decisionmakers; similarly, they have an incentive to find out which officials are responsible for mistakes. But individual taxpayers have little incentive to find out which public official is responsible.

37. See Wall Street J., Sept. 5, 1975, at 5, col. 2.—Ed.

GOETZ. While I agree with Mark Crain's statement about the lack of incentives for private citizens to take an interest in the workings of government, it can be overemphasized. The same sort of argument can be made about the incentives of the individual corporate stockholder. The important difference between the public and private sectors is that one can buy more than one share in the corporate sector, whereas one's share in the public sector is legally limited.

VI FURTHER RESEARCH

SACKS. We have engaged in a lot of speculation about whether official or sovereign liability would increase government efficiency. Speculation and personal experience are useful, but this is a problem susceptible to research, and we ought to collect some data.

There are two kinds of studies that could be done. First, the government itself could be studied. At one extreme one could analyze the Idaho dam disaster, for which the federal government will pay out about \$800 million in damages, to find out whether the Department of the Interior has improved its procedures as a result. At the other extreme, one could examine the case in which an FBI agent who was in charge of preventing a hijacking provoked a shootout, and the government was held liable for damages inflicted. It would be interesting to find out how the FBI and other agencies improved their procedures for dealing with hijacking.

The second kind of study that I would suggest is a comparison between private industry and government. For example, one could compare the government's response to the Idaho dam disaster to General Motor's response to the litigation involving the Corvair. Which enterprise responded better, and what do we learn from it?

DELLINGER. A comparative study could be done of state jurisdictions. Some have absolute or partial immunity for officials, some have immunity for municipalities, and others have waived immunity or provided indemnification. An attempt might be made to trace the different effects of these systems.

CRAIN. Another comparative study might look at privately owned water utilities. One could examine whether the private or public companies had fewer accidents, and how their different liability might account for this.

BAXTER. I would stay away from the regulated public utilities. There are very strong reasons for believing that regulated public utilities behave more like the Department of the Interior than like General Motors.

SCOTT. Comparisons between single episodes, such as the Idaho dam disaster and the Corvair litigation, present problems of measurement and in-

terpretation. Instead, one ought to study a large sample of cases, the obvious example being auto accidents. One might study auto accident rates for government agencies both before and after the Tort Claims Act was passed; these rates could be compared to those of large private enterprises with numerous vehicles. This comparison would reveal some of the effects of liability and immunity on the degree of institutional response and drivers' caution.