Reforming Public Tort Law

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The gradual movement away from traditional common law doctrines of sovereign and official immunity over the past 40 years has generally been hailed as a victory for individual rights. The author argues that these gains must be weighed against such dangers as inappropriate judicial intrusion in administrative matters and a decline in the capacity to govern.

Public tort law has been profoundly changed since the 1950's, when sovereign immunity and official immunity posed substantial barriers to citizens seeking remedies for torts committed by public officials. Amendments to the Administrative Procedure Act enacted in 1976 waived the federal government's sovereign immunity defense for suits seeking declamatory or injunctive relief against government action, although attempts to abolish the sovereign immunity defense for suits seeking monetary damages have not yet been successful. Even more dramatic than these changes in the law regarding sovereign immunity have been the changes in the law regarding official immunity. A new category of torts - constitutional torts - was recognized by the courts in Monroe v. Pape (1961), which gave new life to the 1871 Civil Rights Act by an expansive interpretation of its provisions. Henceforth citizens found it far easier to sue state and local officials who violated their constitutional rights in what have come to be known as Section 1983 actions.[1] In Bivens v. Six Unknown Named Federal Drug Enforcement Agents (1971) similar suits against federal officials became possible. Changes expanding the grounds for suing public officials have been accompanied by changes limiting the immunity from suit for public officials. The rule that administrators are absolutely immune from suit has been replaced by the rule that they have only a qualified immunity from suit. In conjunction these changes have opened the floodgates for suits against public officials.[2]

While precise figures on Section 1983 actions are not available because these actions are combined with other civil rights actions in federal judicial work load statistics, court observers have ascertained that Section 1983 has now become the second most heavily litigated section of the

United States Code (Schuck, 1983, p.199; Note, 1969, pp. 1486, 1487 n.12.).

Using civil rights litigation as a statistical proxy for Section 1983 actions, Peter Schuck calculated that civil rights filings increased an astronomical 9,578 percent between 1960 and 1980, a growth which is primarily attributable to Section 1983 actions (Schuck, 1983, p.199). The increases in Bivens actions since 1971 have also been dramatic. Between 7,500 and 10,000 Bivens suits were brought against government employees from 1971 to 1981, and the number is steadily increasing. By 1984 approximately one out of every 300 federal officials were named in a pending Bivens action (Schuck, 1983, p. 43).

The consequences of these changes in public tort law have not been adequately studied empirically, but organizational theory would suggest there is ample cause for concern. The most serious danger in the proliferation of suits against public officials is that these officials will draw back from enforcing the law vigorously when threatened with suit (Schuck, 1983, pp. 68-77). Since these suits could be harassment suits rather than suits raising legitimate constitutional claims, energetic administration could be seriously compromised even in cases where genuine rights were not imperiled by government action or where genuine rights would be imperiled by the failure of government to act vigorously. When public tort law allows extensive official liability in conjunction with sovereign immunity, it creates a system with powerful incentives for bureaucrats to engage in self-protective behavior, a form of behavior which undoubtedly hampers the achievement of the public goals of government agencies. In the rush to improve the protection of citizens from wrongful actions by public officials, judges have often failed to pay heed to the consequences their decisions have had on governmental effectiveness. Contemporary public tort law comes perilously close to denying the common law maxim that it is not a tort to govern.

Ironically, it is also questionable whether contemporary public tort law provides significantly expanded protection for individual rights. A recent analysis of Bivens cases handled by the Civil Division's Torts Branch of the Justice Department revealed that only 28 cases had resulted in guilty verdicts at the district court level and that only 5 cases had actually resulted in payment (Wise, 1985, pp. 849-851). An analysis of Section 1983 cases concerning state and local officials has produced similar findings (Project, 1979). When juries are confronted with a suit against a public official who claims to have done no more than sincerely attempt to do his job, juries will generally favor the public official unless egregious behavior belies his claim. This tendency is probably stronger if the plaintiff in the case is

poor, a minority, or a convicted criminal, a common situation in public tort law.

The fact that public officials are extremely unlikely to lose cases in which it is alleged that they committed a public tort has undoubtedly mitigated the impact of the rapid increase in suits against public officials, but it does not imply that there have been no significant costs associated with these cases. Even when public officials win their cases, generally they still have to devote considerable time and effort which could be spent more productively furthering agency goals. Even unsuccessful suits may impose intangible costs to reputation and career potential. Just going before a court can be intimidating. All of these factors suggest that even the threat of a suit may suffice to chill the ardor of those responsible for enforcing laws. Indeed, we may well have achieved the worst of all possible worlds in tort law - a system which deters vigorous and appropriate law enforcement and yet which provides inadequate protection to the genuine victims of torts committed by public officials.

The status quo in public tort law is not viable. Even the Supreme Court has recently had second doubts about its own handiwork. It has called a halt to further extensions of the new public tort law and even even modified it to provide better protection for public officials. The absolute immunity of the President from suit has been acknowledged (Nixon v. Fitzgerald, 1982).

The test for determining whether or not public officials can claim a qualified immunity from suit has been altered with the hope that a new test would allow judges to dismiss harassment suits before summary judgment (Harlow v. Fitzgerald, 1982). While these steps are important, far more extensive and systematic reforms are needed to restore a healthy balance in public tort law between a concern for the rights of citizens and a concern for preserving the capacity of government to act effectively. Virtually conceding its own failure in this area, the Supreme Court has acknowledged that Congress is in a better position than the courts to undertake the job of review and reform and they have encouraged Congress to take the lead in this task (Bush v. Lucas, 1983; Wise, 1985B, p. 746.).

If fundamental reform is inescapable, what are the options which Congress should consider? The most frequently endorsed alternative is to abolish sovereign immunity altogether and to substitute the government for specific public officials as the defendant in public tort suits. Another variation of this alternative would be to preserve sovereign immunity and keep the current system of official liability, but provide for the indemnification of public officials for losses associated with public tort

suits. Indemnification is a variation of the abolition of sovereign immunity alternative because it transforms official liability into a legal fiction masking the reality of sovereign liability.[3] A second alternative would be to turn the clock back and to restore the comprehensive official immunity which existed during the 1950s before the public tort revolution of the 1960s began. While this alternative is rarely, if ever, defended today, it had cogent defenders during earlier eras and is worth brief reexamination in light of current developments. A third alternative would focus on institutional changes as a precondition for appropriate changes in legal doctrine. From this perspective the precondition for the development of a viable public tort law is a system of administrative courts which can be more sensitive than ordinary courts to the necessities which constrain administrators as they simultaneously attempt to secure public goals and to respect the rights of citizens. I shall now turn to a systematic examination of each alternative. I shall argue that it is this final alternative which holds the greatest promise for balanced reform, but before I develop the case for this it is important to consider the first two alternatives.

Abolishing Sovereign Immunity

Replacing the principle of sovereign immunity with the principle of sovereign liability would initially appear to provide an appropriate solution to the contemporary crises of public tort law. On the one hand, sovereign liability would provide a more comprehensive remedy for victims of public torts and would therefore better vindicate their rights. Since governments have deeper pockets than individual or public officials, allowing individuals to sue the government would virtually guarantee that suits judged meritorious would result in full compensation, whereas under the current system the limited resources of public officials may artificially limit settlements. On the other hand, relieving public officials of the fear of tort suits would seem to eliminate the incentives of the current law which inhibit vigorous law enforcement by public officials. Any reform which promises to protect rights and enhance governmental effectiveness deserves serious consideration.

Relying on sovereign liability rather than official liability has one notable problem associated with it. While relieving public officials of the fear of suit would remove incentives which inhibit vigorous law enforcement, it would also remove incentives which curb abusive and arbitrary actions by public officials. Sovereign liability collectivizes responsibility for public law torts and therefore introduces a moral hazard

problem. To compensate for this, proponents of sovereign liability would generally couple this legal reform with the introduction of a new disciplinary system for public employees. Allowing government to seek indemnification from a public official for damages it has been forced to pay as a result of malicious or irresponsible behavior by that official would provide the additional incentives needed to deter official wrongdoing.

However, an historical survey of American public tort law would suggest that the abolition of sovereign immunity would not in fact reconcile the tensions between securing effective governance and protecting individual rights even if coupled with an indemnification program to deal with the problem of moral hazard. Historical analysis is relevant to a consideration of how our system would operate without sovereign immunity despite the fact that sovereign immunity won early acceptance as a principle of American law and was not formally repudiated in our subsequent legal history. This formal triumph of sovereign immunity notwithstanding, there was one period prior to the modern era when sovereign immunity was de facto routinely circumvented by an expansive use of official liability. This occurred during the late 19th century as laissez-faire jurisprudence came to dominate the court. A closer examination of this period suggests that the foremost problem with abolishing sovereign immunity is not the problem of moral hazard and the danger this poses for individual rights, but rather the danger to governmental effectiveness posed by heightened judicial scrutiny of administrative action.

The role that the doctrine of sovereign immunity played in limiting inappropriate judicial incursions into administrative affairs was well-recognized on the eve of the laissez-faire era. In Louisiana ex rel. Elliot v. Jumel (1883), Chief Justice Waite upheld a Louisiana Debt Ordinance passed in 1879 which abrogated contractual obligations assumed by Louisiana in an 1874 Funding Act. Louisiana's creditors, whose investments were jeopardized by the Debt ordinance, had tried to evade the constraints of the Eleventh Amendment, which guaranteed the sovereign immunity of the states, by suing the individual state officers who controlled the disbursement of state funds. Speaking for the majority, Waite denied both the mandamus and the injunction which the creditors sought to compel the state to abide by its 1874 Funding Act even though he conceded that the state could not constitutionally renege on its contractual obligations.
Despite the justice of the creditors claims, Waite insisted that judicial redress was unavailable because:

> The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest were paid in full, and that, too, in a proceeding to which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot thus be ousted of its jurisdiction and the judiciary set in its place (Jacobs, 1972, p. 121).

Nevertheless, some judges during this period chafed at the restraints imposed by the sovereign immunity doctrine. Justice Field, one of the patriarchs of activist laissez-faire jurisprudence, wrote a dissenting opinion in Louisiana v. Jumel which argued that the sanctity of contractual obligations superseded sovereign immunity concerns in this case, and his demotion of sovereign immunity foreshadowed the fate of that doctrine during the laissez-faire era. It was the expansion in scope of the due process and equal protection clauses of the Fourteenth Amendment, however, and not the contract clause, that eventually provided the constitutional justification for encroachments of sovereign immunity.

Reagan v. Farmers Loan and Trust (1894) indicated the emerging doctrine of the laissez-faire court. Farmers Loan and Trust Company was the trustee for a Texas railway company which objected to the freight and passenger rates established by the new Texas Railroad commission. Filing suit against the railroad commissioners and the Texas Attorney General, the company asserted that the "unreasonable" rates established by the commission confiscated property without due process of law. Writing for a unanimous court, Justice Brewer dismissed an attempt by Texas to invoke sovereign immunity to preclude the court's jurisdiction. Brewer insisted that there was a distinction between the pecuniary interests of the state, which were protected by sovereign immunity, and its governmental interests, which were not. Since an adverse judicial opinion in this case would not directly compel state expenditures (the state was primarily acting to protect private parties from exorbitant railroad rates), the Eleventh amendment's jurisdictional restraints did not apply.

The culmination of the laissez-faire activist attack on sovereign immunity was Ex Parte Young (1908). In this case a strict Minnesota law regulating railroad rates was struck down on Fourteenth amendment

grounds. In addressing the jurisdictional questions which were raised by the case, the court dismissed the argument of Minnesota's Attorney General Edward Young that he had acted exclusively as an agent of the state and that the Eleventh Amendment barred the stockholders of the Northern Pacific Railway Company, who had initiated the case, from seeking an injunction against him. In effect, the court permitted plaintiffs to successfully circumvent sovereign immunity constraints on judicial jurisdiction by naming a specific officer rather than a state government as a defendant even though in reality the suit was against a state. Ex Parte Young was significant not only because it solidified the line of reasoning emerging from Reagan and sealed the door on potentially competing precedents which would have given greater weight to the sovereign immunity claims of the states, but because it legitimated new judicial procedures to protect constitutional rights. Henceforth a single federal judge could issue restraining orders of indefinite duration to state officials without notice or an adversarial hearing in which the state could contest the injunction (Jacobs, 1972, p. 147). Solicitous of property rights, many laissez-faire judges used these new powers extensively, virtually ignoring the competing claims of effective state governance.

Contemporary critics of sovereign immunity diverge in their explicit responses to this historical legacy of earlier attempts to circumvent sovereign immunity. Kenneth Culp Davis, the most prominent critic of sovereign immunity among post-New Deal administrative law scholars, denies that there is a strong and necessary relationship between an expansive judicial role and the abolition of sovereign immunity. Peter Schuck, the most prominent critic of sovereign immunity among 1960s and 1970s administrative law scholars, acknowledges that the abolition of sovereign immunity would entail a more expansive role for the judiciary in supervising the behavior of the administrative branch, but he argues that this more expansive role is necessary to curb official wrongdoing. A brief examination of each position will clarify some of the implications for our legal system of abandoning sovereign immunity.

Paradoxically, Kenneth Culp Davis cites Ex Parte Young approvingly and condemns sovereign immunity even though he is unsympathetic to laissez-faire jurisprudence. The paradox can be resolved by considering the essential elements of Davis's case against sovereign immunity. Davis's most fundamental objection to sovereign immunity is that it leads to "gross inefficiency in the allocation of functions between officers and agencies" (Davis, 1969, p. 383). Sovereign immunity asserts a radical distinction between the government and every private actor. Under

this doctrine an individual wronged by a private actor may be entitled to judicial redress whereas an individual wronged in precisely the same manner by a government actor may find judicial redress foreclosed. Davis believes this distinction is artificial and it inhibits an optimal use of judicial review because courts are prevented "from resolving controversies they are especially qualified to resolve" (Davis, 1969, p. 383). It is the type of case rather than the fact that government is a party to the case that should determine whether or not administrative, political, or judicial review is an appropriate form of redress. The asymmetry in cases introduced by the doctrine of sovereign immunity has not only distorted the appropriate relationships among the branches but has thereby produced procedural and substantive injustices.

This argument against sovereign immunity is subject to a crucial qualification. Repudiating the doctrine of sovereign immunity would significantly expand the role of the court in mediating disputes between government and its citizens. The courts, for instance, would have to determine when administrators abused their discretionary authority, and that would entail a more active supervision of the bureaucracy by the judiciary. Although undaunted by that prospect, Kenneth Culp Davis does note a potential danger:

> Liability for highly discretionary action is often appropriate, so long as it can be imposed without undue judicial assumption of functions that can be better performed by administrators or executives (Davis, 1972, p. 477).

Davis concedes that expanding the court's jurisdiction in this manner would be undesirable if the court used its newfound powers to usurp executive powers. If that were to occur, the allocation of tasks among the branches might prove even more inefficient than it was under the doctrine of sovereign immunity.

On the eve of the 1970s Davis could still be confident that the judiciary would not repeat the excesses of the laissez-faire era. He was optimistic that judicial restraint would prevail even without the doctrine of sovereign immunity because he believed that other judicial doctrines, such as the doctrine that courts only extend their scope of review to issues appropriate for judicial determination, could provide the needed restraint. These alternative sources of judicial restraint were preferable to the doctrine of sovereign immunity because they were more discriminating instruments

of restraint and were less likely to prevent the judiciary from resolving those cases which Davis believed it was well-suited to resolve.

This is made clear in Davis's rejection of the conclusions of the Supreme Court in Larson v. Domestic & Foreign Corporation (1949), a case in which the court conceded the sovereign immunity of the federal government, justifying its decision as necessary to prevent judicial interference in executive departments which would harm effective government.

> The Court in 1840 [Decatur v. Pauling, a precedent cited in Larson] assumed that it had to choose between performing executive tasks and refusing review; its choice was a good one. But later the Court learned that the assumption was mistaken; during the early part of the twentieth century, the Court invented a limited scope of review, so that the choice was no longer between judicial performance of executive tasks and refusal of review. By the time Larson opinion was written in 1949, the usual practice was for courts to review the ordinary tasks of executive departments but to limit the review to such questions as constitutionality, statutory authority, proper procedure, abuse of discretion, and findings supported by substantial evidence (Davis 1972, p. 498).

Davis 's confidence that "courts are quite successful in staying out of areas into which they should not intrude," however, became seriously questionable in light of the judicial activism of the 1960s and 1970s and specifically in light of the failure of the court to strike a reasonable balance between powers of government and individual rights in whittling away the immunities of public officials from suits (Davis, 1969, p. 395).

If Kenneth Culp Davis's argument against sovereign immunity rests upon premises which are no longer tenable with the resurgence of judicial activism in the 1960s and 1970s, this is not the case with Peter Schuck's Suing Government, the most comprehensive contemporary treatment of public tort law. Like Davis, Schuck concludes that sovereign immunity is an achronistic legal concept - an unjustifiable impediment to the development of the Rule of Law and the protection of individual rights - and he favors the development of a system based on sovereign liability. Unlike Davis, however, Schuck acknowledges that the abolition of sovereign immunity will entail a significant expansion in the role of the judiciary. He

explicitly acknowledges the judicial activist implications of his commitment to developing a comprehensive public tort law:

> Constitutional law, like administrative law, allocates decision making power among the organs of government. Public tort remedy, reflecting this parentage, likewise constrain legislatures and bureaucracies, transferring political power and policy initiative from those branches to courts (especially federal judges) and to private litigants (Schuck, 1983, pp. 52-53).

Indeed, Schuck's argument legitimates quite extensive transfers of power to the courts, for in some cases he even defends the judicial use of structural injunctions - a highly intrusive form of judicial intervention in which courts virtually take over some aspects of policy-making and policy implementation within an agency to curb what the court determines to be wayward bureaucratic behavior.[4]

Schuck does not object to the activism which has created the new public tort law in the 1960s and 1970s, but he does object to the means, official liability, which the activists chose to realize their project. He considers official liability to be a poor substitute for government liability for a variety of reasons. In a legal system which emphasizes official liability, many government officers are sued for actions they cannot legitimately be held responsible for because torts are often a product of general bureaucratic patterns rather than the actions of any identifiable official. Officials who have merely followed orders may be sued because their superiors are immune from suit. Officials who are unjustly sued may suffer financial loss and psychological strain even if they are exonerated in the courts. Vigorous enforcement of our laws is jeopardized if officials seek to avoid these costs by acting with excessive caution when their actions may result in tort suits. At the same time, official liability does not provide adequate protection for individual rights because even a successful action in tort will fail to provide adequate restitution if the financial assets of the official at fault do not cover tort damages. Bringing public tort law more into line with private tort law by generally replacing official liability with sovereign liability would provide greater protection for both government officials and private individuals. It would place the financial burdens of tort liability on the actor with the deepest pockets, and it would encourage high government officials, who have the greatest power to reshape bureaucratic environments, to provide additional safeguards against abuses of government authority (Schuck, 1983, p. 183).

However, these potential benefits would have to be weighed against potential costs. Considering the problem exclusively at the federal level, where the Eleventh amendment does not pose a constitutional barrier to abolishing sovereign immunity, would the reforms proposed by Schuck necessarily enhance rational governance, or even necessarily provide better protection for individual rights? Entrusting courts with plenary powers to assess damages against the federal government by abolishing sovereign immunity would reduce the budgetary discretion of the political branches by mandating expenditures to satisfy tort claims, and the limitations on budgetary discretion could be far more significant than those which have resulted from the previous incremental approach of waiving sovereign immunity only in certain specified areas, as was done in the Federal Torts Claim Act. Since the expenditures mandated by the courts would be determined independently of all other budgetary items, there would be no opportunity to weigh the expected benefits of other potential expenditures. Weighing the opportunity costs of expenditures is a prerequisite for rational budgeting, and this can only occur when the budgetary power is relatively concentrated. Furthermore, since many government expenditures enhance the protection of rights, a diversion of funds from these rights enhancing activities of government into the satisfaction of tort claims could easily diminish the total protection of rights provided by government.

Abolishing sovereign immunity would effectively delegate to the courts the responsibility for determining the appropriate balance between government effectiveness and individual rights in those areas where government activities may result in torts against citizens. Schuck never investigates the institutional competence of the courts to strike an appropriate balance between these partially conflicting aspects of liberal governance. His analysis of the institutional pathologies of bureaucracies is not matched by an analysis of the institutional pathologies of courts despite the fact that Schuck acknowledges that courts have done a very bad job of striking such a balance in official liability suits over the past twenty years. Rather than consider the threat to effective governance which has emerged during this period with the growth of section 1993 and Bivens suits as evidence that the courts are systematically biased in favor of individual rights (which is not in and of itself inappropriate if their role is suitably circumscribed within a system based upon a separation of powers), and therefore ill-suited to strike a comprehensive balance between powers and rights, Schuck assumes that the imbalance has arisen because courts have denied full remedial powers by the doctrine of sovereign immunity and have

therefore over-extended official liability to compensate for this weakness (Schuck, 1983, pp. 29-30, 182-183).

This explanation of the imbalance in contemporary public tort law is insufficient. Even if the courts lacked the power to strike the best possible balance between government effectiveness and individual rights because of constraints imposed by the doctrine of sovereign immunity, it was within their power to strike the best possible balance within the limits imposed by sovereign immunity. Government immunity from suit alone can neither explain nor justify the excesses which have developed in official liability law during the past twenty years. If the doctrine of sovereign immunity has led to serious injustices, the over-extension of official liability has only made a bad situation worse. If courts have failed to protect the prerequisites of effective governance in the area of official liability, there is no reason to believe they would do so if sovereign immunity were abolished. There is, on the contrary, every reason to believe that the current imbalance would reemerge within a context of significantly expanded judicial responsibilities, and hence with even more extreme adverse consequences.

Turning Back the Clock

The unsatisfactory state of contemporary public tort law and the unresolved problems associated with any attempt to radicalize the trends of the past thirty years and to do away with sovereign immunity altogether put the traditional doctrines of sovereign immunity and official immunity in a more favorable light. Judge Learned Hand's restrictive approach to official liability in Gregoire v. Biddle (1949), for instance, can no longer be confidently dismissed, as it so often was during the 1960s and 1970s. In that decision Hand concluded that two successive Attorneys General of the United States and other federal officials who had been charged with maliciously detaining the plaintiff, Gregoire, as an alien enemy during the second World War were absolutely immune from suit. Hand reasoned:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for

> doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties...As is often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation (Davis, 1972, pp.485-486).

Notwithstanding the fact that Hand's concern with harassment suits has proved well-founded, however, any attempt to restore Hand's conclusions as a ruling doctrine for official immunity case law faces virtually insurmountable obstacles. To return to Gregoire v. Biddle would require the overturning of numerous official immunity precedents. Even if the courts proved willing to dramatically reverse themselves in this regard, a restoration of the 1950s status quo ante would still leave many victims of public torts without effective redress and would therefore be as objectionable as the contemporary solution which has endangered effective governance for the sake of vindicating individual rights. Indeed, the expansive conception of official immunity prevalent during the 1950s was a distortion of our common law heritage, for the common law had allowed many suits against public officials as a means of checking the abusive use of sovereign power. Such a solution is hardly tenable after the creation of a class of constitutional torts has given added weight to the claims of individuals wronged by public officials.

Hand could have tempered the harshness of his conclusions by arguing, as traditional defenders of sovereign immunity like John Marshall had, that in circumstances such as these, where judicial redress was precluded, that redress through appeal to the legislature remained possible. But however effective legislative redress might have been in earlier eras when Congress relied heavily upon private bills for such purposes, this remedial route is no longer viable in an age when the crowded legislative agenda of Congress precludes a meaningful role for private bills. Under these circumstances the only way Congress could perform the traditional role which it played in the American tort law would be if it delegated to

others its powers to determine under what circumstances its sovereign immunity claims would be waived. This solution, which can more accurately be portrayed as an adaptation of the traditional doctrine of sovereign immunity than as its repudiation, is examined in the following section.

This conclusion regarding official immunity is reinforced by a consideration of recent cases dealing with sovereign immunity, although the argument is more complex in this area. To suggest that courts will not be able to control the expansion of liability suits against government appears to be contradicted be recent developments in administrative law. The move towards a repudiation of sovereign immunity which began to come to fruition during the Warren Court and which has been championed by Justice Brennan in the post-Warren Court era has been slowed and in some cases even reversed by conservatives on the Rehnquist Court. These developments have led some administrative law scholars to conclude that the courts have reached the limits of their willingness to impose financial burdens on government and thereby indirectly on taxpayers, especially at the federal level (Rabkin, 1988). A prominent case which supports this line of argument in U.S. v. VARIG Airlines, a case in which the Supreme Court refused to attribute liability to the federal government for the regulatory negligence of airline-safety inspectors who might have averted an airline crash by the exercise of greater care, citing traditional doctrines of sovereign immunity in justifying this decision.

Varig notwithstanding, it would be premature to conclude that the erosion of the doctrine of sovereign immunity has run its course. The cases which have called into question that doctrine are numerous; the prevailing judgment in the law review literature on this theme continues to be that the doctrine is an anachronism, and the judges who have sought to stem the tide of sovereign liability have not yet advanced compelling arguments in favor of their position. The anemic character of judicial attempts to limit government liability are well illustrated by a line of cases which culminated in Pennsylvania v. Union Gas Co (1989).

Union Gas affirmed the power of Congress to abrogate state sovereign immunity by creating causes of action against states where monetary relief will be assessed in federal courts. When workers from the Commonwealth of Pennsylvania who were excavating a site near the Brodhead Creek accidentally disturbed a waste disposal facility of the predecessors of the Union Gas Company, coal tar began to seep into the creek. The EPA helped in the clean up and then sued the Union Gas company to recover its costs. Union Gas in turn sued the state in federal court for negligence in its excavation. The district court barred the suit on

Eleventh Amendment grounds. After an appellate and remand cycle the Supreme Court eventually permitted the suit to proceed on the grounds that Congress pursuant to its Article I commerce powers could subject the states to liability and that it had clearly intended to do so in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Union Gas is of particular interest because it revitalized the movement away from sovereign immunity after a brief interlude during the early days of the Rehnquist Court when it appeared as if sovereign immunity might be making a comeback. During the 1960s and 1970s the Supreme Court had affirmed the power of Congress to subject states to suits for monetary damages in federal courts pursuant to its constitutional powers. Parden v. Terminal Railways, (1964) held that states could be sued under the Federal Employers' Liability Act for the work-related injuries of employees on state-owned railroads. Fitzpatrick v. Bitzer (1976) permitted Congress to subject states to suits for monetary damages pursuant to its 14th Amendment powers. During the mid 1980s, however, the court began to backtrack. In Atascadero State Hosp. v. Scanlon (1976) and in Welsh v. Texas Department of Highways & Public Transportation (1987) the court limited the basis for congressional abrogation of state sovereign immunity by partially overruling Parden and by throwing into doubt Congress' power to overcome state sovereign immunity through the Commerce power.

With Union Gas the retreat from Parden was shortcircuited. While the decision of the court was fragmented (there were five opinions), there are grounds for believing that this decision is not an aberration. Liberals on the court like Justice Brennan had played an important role in eroding the traditional doctrine of sovereign immunity, but Union Gas demonstrates that conservatives may not prove any more sympathetic to the doctrine than liberals had. Justice Scalia provided the key vote in Union Gas , joining with Justice Powell in overruling Parden and even suggesting that Hans v. Louisiana, a nineteenth century precedent which was one of the mainstays of an expansive understanding of the Eleventh Amendment, might appropriately be reexamined. The Court does not appear to be headed toward a revival of the traditional doctrine of sovereign immunity.

Public Tort Law and Administrative Courts

The rejection of the doctrine of sovereign immunity would expand the jurisdiction of the courts and place far more responsibility for balancing

the conflicting demands of effective governance and individual rights in the hands of judges. The previous history of the courts points to a systematic bias in favor of rights when the courts have found ways to circumvent the logic of sovereign immunity. On the other hand, a return to the status quo ante of the 1950s would leave the responsibility for rectifying wrongs primarily in the hands of the legislature, and there is little reason to believe that institution could devote sufficient attention to individual cases to provide adequate protection for individual rights. Under these circumstances the balance between governmental powers and individual rights would unduly favor the former. The need for a middle path which strikes a reasonable balance between individual rights and effective governance is evident.

If neither courts nor legislatures appear capable of striking an appropriate balance, perhaps the creation of a system of administrative courts would provide an institutional foundation for the emergence of a more balanced approach. These courts could be entrusted with the responsibility for handling suits against government and its officers and could determine the general principles governing waivers of sovereign immunity. On the one hand, administrative courts would differ from ordinary courts in their sensitivity to the realities of the administrative process. On the other hand, administrative courts could become spokesmen defending individual rights within the administrative process, thus sensitizing administrators to the impact of their decisions on individual rights. The practicability of this approach is demonstrated by its successful institutionalization in several European countries, most notably France.

The French conceded substantial state liability by the end of the 19th century and the decline of sovereign immunity in that country did not jeopardize effective government while it did lead to far more justice for private citizens. Distinguishing between"personal fault" and "service connected fault," the French hold administrative officers personally liable only when they commit torts which are essentially unconnected to their government service. In those cases where a government officer commits a tort which would not have been possible had he not been a government official, the state assumes responsibility. The French Counseil d'Etat, the highest administrative court, has also conceded the subsequent right of the state to seek indemnification from those officers who were grossly negligent or malicious in attending to their responsibilities, thus mitigating the "moral hazard" which arises when state liability replaces the personal liability of government officers.

What is critical to note, however, is that the institutional framework for adjudicating claims against the government in France is a

system of administrative courts, and that similar broad liability doctrines applied to the United States as long as its independent common law courts were still responsible for handling such claims would probably lead to very different results. One of the most significant episodes in the evolution of the French legal system occurred in 1870, when after the fall of Napoleon III, the new French government issued a decree abrogating article 75 of the existing Constitution, an article which prohibited suits against public officials unless the government consented to the suit. The new decree, which would have given jurisdiction over public tort suits to the courts responsible for private law, was undermined by the French courts when they rejected the proffered jurisdiction as a violation of the strict doctrine of separation of powers embodied in the French Constitution The new decree would have forced French judges to supervise the administrative branch, and this they did not feel competent or constitutionally empowered to do (Schwartz, 1954, pp. 256-258).

After this act of judicial self-restraint by civil court judges, attempts to expand government liability for torts focused on placing responsibility for assessing claims in the hands of a separate system of administrative courts capped by the Conseil d'Etat. A rigid concept of separation of powers protected French administration from judicial interference without the sovereign immunity doctrine. American government presupposes a far more fluid concept of separation of powers, and in this context the doctrine of sovereign immunity has been far more essential for limiting judicial activism.

There are other reasons for believing that the replacement of the doctrine of sovereign immunity with the doctrine of sovereign liability unless this were accompanied by the creation of a system of administrative courts with responsibility for handling public tort law cases would have adverse consequences on government effectiveness in this country which did not accompany the acceptance of sovereign liability in France. French administrative law reflects the strong 'etatist tradition which has nurtured that law. French legal theorists, for instance, would never conceptualize the state as merely another private actor in the way which some American legal theorists would.[5] French administrative lawyers have, therefore, generally distinguished the principles of liability applicable to public officials from those applicable to suits between private citizens. Furthermore, the French judges who serve in administrative courts and who have developed French administrative law are members of an administrative elite, especially of *les grands corps de l'etat*. They have generally had administrative responsibilities prior to judicial service and are therefore more appreciative

of administrative realities than are American judges who specialize in private law (Schwartz, 1954, p. 271; Suleiman, 1974, pp. 239-247).

We cannot expect to duplicate some of these features of French legal thought and of French institutional development in this country. Nevertheless, administrative courts are not as foreign to the Anglo-American legal system as common law purists like A. V. Dicey once assumed, and they do offer a promising alternative to the use of regular courts in developing public tort law. It is beyond the scope of this article to offer concrete proposals for establishing administrative courts to deal with public tort law, and the details concerning implementation of such a proposal could undoubtedly critically effect its success. Further research would be required to indicate what institutional agreements are most likely to allow administrative courts to develop sufficient autonomy from administrative agencies so that they can effectively protect individual rights while being sufficiently responsive to the needs of administrative agencies that they not unduly hamper their operations. At the very least, the possibility of developing new and more expeditious modes of procedure to deal with public tort law cases holds considerable promise for reducing the disincentives for vigorous law enforcement associated with the current system to actually provide financial restitution to those whose rights have been violated.

Conclusion

The extent to which English citizens could secure redress for wrongs committed by the government despite the doctrine of sovereign immunity led Louis Jaffe to question "not whether the doctrine of sovereign immunity was 'right' but whether as a practical matter it ever has existed" (Jaffe, 1963, p. 1). This deprecation of the historical importance of sovereign immunity in the Anglo-American tradition appears sensible as long as we focus on the question of whether or not the doctrine shielded the government from any form of accountability for its acts. But if the purpose of the doctrine had never been to simply shield government from responsibility, but rather to provide for an appropriate forum for determining that responsibility, then the historical role of sovereign immunity cannot so easily be dismissed. The willingness of common law judges to accept sovereign immunity limitations on their jurisdiction was enhanced by the existence of alternative routes of redress through special courts more closely tied to the interests of the king. In some ways those special courts were the precursors of modern administrative courts, and

despite the fact that these courts were less autonomous from the executive than common law courts were, citizens wronged by government officials filed petitions of right for redress of those wrongs with reasonable expectations that meritorious claims would be honored.

Proposals for developing administrative law courts in this country have generally been resisted by those who would defend our common law heritage of a unified legal system which rejects separate jurisdictions for public law and private law cases. Were our tradition as univocal in this regard as some have suggested, the radicalness of a proposal to create administrative courts would justifiably provoke intense skepticism. Yet the history of the common law of sovereign and official immunity itself points to the importance of the distinction between public and private law within the common law tradition. The distinction encouraged judicial restraint vis-a-vis the executive branch and permitted the emergence of alternative modes of redress better-suited to strike an appropriate balance between the powers of government and the rights of individuals.

Endnotes

1. The section of the 1871 Civil Rights Act legitimating private suits to enforce its provisions was reenacted as Section 1983 of the U.S. Code.

2. For a more detailed overview of these legal changes, see Rosenbloom, (1980) "Public Administrators' Official Immunity and the Supreme Court: Developments During the 1970s," Public Administration Review, vol. 40 (March/April 1980), pp. 166-172.

3. In practice an indemnification program would probably not be comprehensive and therefore would be different than a straightforward abolition of sovereign immunity. Since the abolition of sovereign immunity is the more radical alternative to the contemporary status quo and has generally been portrayed as a superior solution to any partial indemnification program, we will focus our attention on the abolition of sovereign immunity. For further treatment of the partial indemnification alternative and its relationship to the abolition of sovereign immunity, see Wise, 1985B.

4. Schuck does not altogether abandon the idea of judicial restraint. He categorizes judicial remedies in terms of their intrusiveness in the bureaucratic process and advocates the least intrusive remedy which curbs bureaucratic abuses. Nevertheless, he leaves it to the discretion of the courts to determine the level of intrusiveness required.

> Courts should place initial emphasis upon legislative and administrative interventions, reflecting the relative versatility of resources, strategies and leverage available to those institutions for influencing low-level behavior. But legislatures may fail to act, or their actions may not succeed in deterring or eliminating official wrongdoing that threatens clearly established legal rights. Administrators may likewise fail to control low-level misconduct; they may even be accomplices in it. In such cases, citizens must look to the courts to fashion relief. (Schuck, 1983, p. 184).

For Schuck the judiciary is the final arbiter in mediating disputes between the citizenry and the government, and this standard pays little more than lip service to the idea of specific institutional competences, a principle which would counsel judicial restraint regarding decisions which are best left to the political branches even when those branches are not at that time functioning optimally.

5. Kenneth Culp Davis's argument that in handling complaints by citizens the division of labor between administrative agencies and the courts should be determined by the type of case rather than by type of party to the case is an example of legal thinking which treats the state like a private party. See above p. 12.

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