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Suing Government

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SUING GOVERNMENT. By *Peter H. Schuck*. New Haven and London: Yale University Press. 1983. Pp. xxi, 262. \$25.

In theory, the American system of private tort law can be characterized as substantively broad and remedially just. The realm of the public tort, however, stands distinctly apart from this substantive and remedial soundness. The wrongdoings of government officials, whether negligent or intentional, are often treated differently from the misconduct of others. In *Suing Government*, Professor Peter H. Schuck¹ examines, clarifies, and criticizes the current public tort doc-

1. Peter H. Schuck is a professor of law at Yale Law School.

trine and proposes a comprehensive system of reform which would narrow the chasm between public and private tort law to a thin, practical boundary of official immunity.

In developing Schuck's analytical framework, the first part of the book carefully examines the sources of official misconduct as well as the goals and evolution of public tort remedies. Official misconduct, Schuck explains, "springs from diverse sources" each demanding a "problem-specific" response (p. 3). While simple negligence is the most common source, Schuck points to others, including: "comprehension-based" misconduct such as message distortion, which can occur when court mandates filter down to the implementing officials (pp. 4-6); "capacity-based" misconduct such as time and budget constraints (pp. 6-8); and motivation factors such as peer pressure and concern for self-protection (pp. 8-12).

Schuck further develops his analytical problem-solving framework by examining the remedial goals of public tort law: deterring official misconduct, encouraging vigorous decision-making, compensating victims, exemplifying moral principles, and achieving institutional competence (p. 16). Schuck ultimately proposes a plan that purports to accommodate these often inconsistent goals more adequately.

Completing his analytical framework, Schuck explains the evolutionary history of public tort remedies beginning with the English common law and culminating with the current status of government liability under the Federal Tort Claims Act (FTCA),² section 1983,³ and the *Bivens* remedy.⁴ The legal response to official misconduct remains primarily one of damage remedies against individual officials (p. 55).

The second part of *Suing Government* seeks to establish the need for reform. Drawing upon empirical studies of low-level officials who most frequently deal with the public, Schuck develops a model of official behavior that defines officials' on-the-job response to individual liability. Using this model to evaluate the effectiveness of official liability, he concludes that the present system results in official behavior that is far from optimal.

Since the present system is primarily one of individual liability, the model only addresses official behavior that results from exposure to "litigation-related risks" (p. 60). The term "litigation-related risk," is used instead of "risk of liability" because defending any suit, even

2. 28 U.S.C. §§ 1291, 1346(b), 1402, 1504, 2110, 2401(b)-2402, 2411-2412, 2671-2680 (1976).

3. 42 U.S.C. § 1983 (1976).

4. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The Court held in *Bivens* that the fourth amendment implicitly conferred a private damage remedy for its violation by federal officers.

those that predictably will fail, is costly and subject to outcome-uncertainty (p. 70). Exposure to litigation-related risk, Schuck explains, flows from the particular features of the work environment. For the government official, those features include, for example, the large number of interactions with the public (p. 60), the official's legal duty to act (p. 62), and the "plethora of rules" to which officials are subject (p. 66). The author's point is that the public official is exposed to a greater risk of becoming involved in litigation than his private sector counterpart, and that this exposure significantly influences his behavior.

Schuck's model also explores the behavior that officials engage in to minimize risk. According to Schuck, there is a minimum level of risk, though not necessarily fixed, that any given public official is willing to accept. Beyond this "duty threshold" (p. 68), officials use various strategies to reduce their personal risk.

One such strategy is inaction. This is perhaps the bureaucrat's preferred response when faced with a high-risk decision. Schuck asserts that inaction is a risk-minimizing option because it is too inconspicuous to draw a lawsuit. Moreover, even if an official's failure to act does not go unnoticed, such a decision is typically so well-entrenched in his discretionary authority that "any official duty to act affirmatively is as a practical matter unenforceable . . ." (p. 72). Thus, the official who fears litigation has a strong incentive to do nothing. As the author puts it, "[i]nspectors who fail to enforce clearly applicable statutes against pugnacious or litigious violators are unlikely to be sued by the consumers whom they did not protect, whereas inspectors who *do* enforce vigorously may now be subject to suit under § 1983" (p. 72, emphasis in original, footnotes omitted).

A closely related strategy is delay, which can, for example, take the form of unnecessary requests for supervisory approval or burdensome demands for additional factual data before taking action. Whatever the form, unnecessary delay is costly and often has the same result as inaction. Schuck points to the "criminal who can no longer be apprehended" and "parental child abuse that can never be wholly remedied" (p. 73) as examples of the costs of dilatory decisionmaking.

Yet another method of reducing litigation-related risk involves the use of unnecessary formalism such as elaborate record-keeping and paperwork. This approach is merely another aspect of "delay" strategy and involves the development of painstaking, ritualistic procedures and the accumulation of data for use in defending future lawsuits. The result, according to the author, is that ritual predominates over public service, leading to an inflexible approach to problem-solving and decisionmaking.

A final risk-reducing bureaucratic strategy involves the alteration

of the character of decisions so as to substitute relatively riskless acts for risky ones. For example, a parole officer may refrain from recommending the release of a seemingly worthy prisoner "in order to minimize the risk of being sued by potential victims" (p. 75) or FDA officials may fail to approve an apparently safe drug (p. 76). Schuck's point is simply that the consideration of litigation risks may significantly distort the decisionmaking process.

In light of his model of official behavior and the established goals for public tort law, Schuck concludes that individual official liability is unsound remedial policy. He finds official self-protection to be "a significant and growing problem" (p. 79) and that as a result, official liability "exact[s] a high price" upon society (p. 82).

Schuck argues that the availability of absolute and qualified immunity fails to alleviate bureaucratic risk-avoidance schemes while simultaneously leaving the victim of official misconduct without redress. The courts' process of allocating this immunity, Schuck convincingly argues, is made "on the basis of distinctions that bear little relationship to protecting vigorous decisionmaking" (p. 89). Moreover, these distinctions do not allow for predictability, so it remains unclear whether a particular decision will ultimately be entitled to some form of immunity.

With the case for remedial reform well established, the author's emphasis then shifts to the proposed remedial measures. Schuck recommends substantially expanded governmental rather than personal liability for official misconduct as the best course of action. "[G]overnment [should] be obliged to compensate for every harmful act of omission committed by its agents within the scope of their employment that is tortious under applicable law" (p. 111). Specifically, the author proposes that agencies be liable for the official misconduct of those individuals within their respective departments.

According to Schuck, such a scheme would lead to increased system efficiency, more vigorous decisionmaking, and improved deterrence. The deterrence issue is, as Schuck admits, problematic. He nevertheless argues that deterrence will be strengthened by focusing the incentives to curb misconduct at a better location in the particular agency. The upper echelon of an agency, Schuck suggests, is "relatively well equipped to deter" (p. 104) since "much official wrongdoing is ultimately rooted in organizational conditions and can only be organizationally deterred" (p. 98).

Taking this proposal one step further, the author urges specific changes in the Federal Tort Claims Act (FTCA). These changes generally involve the removal of various exceptions to the FTCA. For example, the FTCA only applies when an act or omission is tortious under applicable state law. Official actions under federal statutes and regulations therefore remain immune from liability.

Pointing to the enormous growth of federal laws since the enactment of the FTCA in 1946, as well as the development of the *Bivens* remedy for official violations of constitutional rights, Schuck sees this state tort requirement as an anomaly that should be repealed (pp. 114-15). The author also proposes that the FTCA be extended to cover intentional torts that are currently excepted for most federal officials. He emphatically notes that this exception "has been consistently interpreted as extending far beyond intentional torts to include the vast and rapidly growing category of *negligent* misrepresentation by officials" (p. 115, emphasis in original).

In addition to expanding the substantive coverage of the FTCA, Schuck also wishes to eliminate some of the procedural obstacles to government liability. In order to compensate victims fully, he advocates awarding a minimum damage amount for non-monetizable rights, punitive damages where appropriate, and attorneys fees (p. 118).

In the final section of the book, Schuck looks inside the "bureaucratic black box" (p. 123) to see how agencies will respond to expanded government liability. He ultimately concludes that because of potential agency liability, administrators will "be pressed to anticipate and respond to low-level misconduct by deploying their stock of behavior-shaping resources — rules, training, discipline, incentives, information, organization support, and the like — in more imaginative and powerful ways" (p. 184).

An examination of *Suing Government* indicates that, to Schuck, the most significant danger of expanded government liability is that agencies will be unsuccessful in their efforts to control official misconduct. Schuck, however, suggests that this danger can be overcome through organizational change and injunctive court remedies.

Suing Government does not evaluate the costs associated with this organizational change nor does it discuss the ultimate cost to the government of paying claims that it would not otherwise be required to pay. One suspects that this cost could be enormous and that added pressure would be put on already strained budgets, a condition that Schuck earlier suggests is a contributor to official misconduct (p. 7).

Moreover, agencies themselves, through the use of rules, incentives, and discipline, may explicitly or implicitly rely on the same risk-aversion techniques that individual officials currently use. For example, Schuck himself suggests that agencies improve their capacity to control misconduct by limiting official discretion with rules and procedures. This suggestion comes dangerously close to the formalism that Schuck claims is a harmful response to potential personal liability. Inaction, delay, formalism, and changes in the

character of decision, albeit to a lesser degree, can all be prescribed by the agency or administrator as well as individual officials.

The author may also be underestimating the complexity of human behavior in his implicit assumption that the financial risks of litigation are the primary cause of the unwanted self-protection techniques. Schuck largely ignores nonfinancial "litigation-related risk" such as the fact that a lawsuit tends to be a poor reflection of performance. Officials, because they are likely to have higher ambitions, will seek to maintain credibility both with superiors and the public by avoiding lawsuits.

While significant uncertainties remain as to the net effect and cost of expanded government liability, Schuck's work is an extremely valuable contribution to the field of public tort law. The need for system-wide reform is convincingly advanced in realistic terms that compel the reader to question the current system and to take a hard look at alternatives. Moreover, many of Schuck's specific proposals are unquestionably sound. These proposals incorporate a great amount of preventive medicine; in this regard, Schuck is to be applauded for attacking the problem of official misconduct at its source. The corresponding "harmonizing" of the problem and the remedy is a central theme of *Suing Government* (p. 82). Its practical analysis not only makes the book interesting to read, but also adds to its utility as an initial blueprint for real-world reform. After reading *Suing Government*, one can only hope that such reform is forthcoming.