

September 1984

Thoughts on Decisionmaking

Patricia M. Wald

U.S. Court of Appeals for the District of Columbia

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Jurisprudence Commons](#)

Recommended Citation

Patricia M. Wald, *Thoughts on Decisionmaking*, 87 W. Va. L. Rev. (1984).

Available at: <https://researchrepository.wvu.edu/wvlr/vol87/iss1/4>

This Essay is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

West Virginia Law Review

Volume 87

Fall 1984

Number 1

Essay

THOUGHTS ON DECISIONMAKING

PATRICIA M. WALD*

I.

Work, Pablo Picasso said, is the “ultimate seduction.” It is certainly what most of us spend most of our lives doing. As professionals, our reputation for sound judgment and good decisions determines in large part our status, our responsibilities, our earning capacity. More importantly, our nation badly needs innovation, risk-taking, vigor, and vision in both the private and public sectors.

Yet our institutions, and particularly our legal system, do not always encourage vigorous decisionmaking. In fact, they often seem to impede or penalize it. As lawyers, we bear some responsibility for that, and, as lawyers, we suffer from that.

I would like to examine decisionmaking in three areas—business, government, and the judiciary—and reflect a little about how our legal system affects these decisions. The legal rules and the legal risks governing decisionmaking in these areas are altogether different and these differences have profound implications for the rest of our society.

II.

As examples, I am going to discuss first two aspects of decisionmaking in the business world that are today under serious challenge: the business judgment rule and the legal risks of taking corrective action while questions of liability are pending in lawsuits. I will focus on the impact of such decisions in the product liability field, because it is there they have such enormous consequences for the public.

The American Law Institute (ALI) is currently engaged in a most controversial enterprise, The Corporate Governance Project, an ambitious effort to formulate the legal duties of care and loyalty owed by corporate directors and managers to

* Circuit Judge, U.S. Court of Appeals for the District of Columbia. B.A. 1948, Connecticut College; L.L.B. 1951, Yale Law School.

This essay is an annotated version of remarks delivered to the Mid-Atlantic Conference of Law Reviews at the West Virginia University College of Law, April 1984.

their shareholders and to define the "business judgment" rule by which officers or directors now defend themselves in stockholder derivative suits.¹ This endeavor is no academic exercise. There appears to be enough at stake so that the Business Roundtable,² arguably the most outspoken advocate of business interests in the legal field, has been in almost continuous communication and occasional combat with the reporters and advisers. But critics, like former Stanford Law School Dean Bayless Manning, have also joined in urging a "fundamental course correction" in the law of director liability. The complaint goes like this:

If a corporate transaction goes sour, or a company fails, any plaintiff's lawyer of even the most modest talent and imagination will always be able to find a subject matter *x* as to which he can denounce its directors, declaiming "Surely any reasonably prudent person in these circumstances would have explored subject *x*, but this board sat back, did nothing, and did not even enquire into it." That argument in hindsight will always sound plausible. And it may appeal to some juries, or even to some courts, inexperienced in the reality of business life. But it is most often just hokum and rhetoric.³

Manning's point is that most corporate directors nowadays are only part-time players; they spend an average of one and a half days on corporate business a month;⁴ they are forced to rely on the expertise of management or other directors; and they can focus on only a handful of decisions that appear on the management controlled agenda.

The chief executive officers are painted as equally beleaguered, making not one but galaxies of decisions in a cosmos of uncertainty. "If I'm right 3 times out of 10, I am doing very well" says one, "4 times out of 10, I'll do better than anybody else."⁵

Yet when the legal system views any one of those decisions retroactively through a shareholder's derivative action, it generally looks at the questionable transaction

¹ The business judgment rule presumes that in making a business decision, the directors acted on an informed basis in good faith and in an honest belief that the action taken was in the company's best interests. Unless there is an abuse of discretion, the courts will respect that judgment. *See, e.g.*, *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) (directors protected by business judgment rule may be held liable only on proof of gross negligence, but to invoke rule, they must be free of personal interest in subject of decision and informed of all material information reasonably available), *discussed in Welch, Delaware Supreme Court Limits Reach of Business Judgment Rule*, NAT'L L.J., April 30, 1984, at 16; *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981); *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920, 926 (1979) (The business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.").

² Founded in 1972, the Business Roundtable is composed of the chief executive officers of major U.S. corporations. The Roundtable conducts extensive research and holds occasional seminars on public issues affecting the economy.

³ Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 BUS. LAW. 1477, 1485 (1984).

⁴ *Id.* at 1481.

almost in a vacuum. Should the director or manager have inquired into this one issue more deeply than others, demanded better answers more insistently? Some would ask a broader question: before imposing liability how did he (or she) behave over the long haul on the flow of corporate business; did he give attention to the main priorities—personnel decisions, the structural integrity of the firm, adequate information systems; did he rise to trouble signals; was any failure to inquire into a particular matter defensible when compared to the other matters on the agenda or his past experience in relying on others?⁶

Nobody wants to excuse lawless or recklessly indifferent conduct by corporate directors, or overreaching, fraud, or outright conflicts of interest. But neither do we want to chill bright young professionals from serving not just on the Board of General Motors but on the board of a prime client's new business or even the local symphony or legal services board. Nobody seems to know very much about how or even whether the threat of personal liability from shareholder suits might have such results. Nor do we know a great deal about the track record of stockholder derivative suits—how often they succeed in recapturing real gains for the corporation and its shareholders, or how often they are used merely as a device to channel money into a sue today-settle tomorrow plaintiff's pocket. How many directors have actually had to pay judgments or defense attorneys' fees from their own pockets, or has insurance and indemnification stepped in to solve the problem already?

This example is a small part of a big problem. As we proceed to restate or even reformulate the standard for individual liability in the corporate context, it seems clear, at least to me, that our slim empirical base needs reinforcement.⁷ What do we really know about how prudent directors act in a variety of circumstances? A large part of our corporate law is judge-made, and in their judicial warrens, judges think in grand and sometimes abstract terms about concepts such as deterrence. Thirty years ago, the great Learned Hand espoused a generous standard for judging public officials: "[I]t 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."⁸ Do we believe that applies to private officers as well? I suspect that today neither I, Dean Manning, the ALI, nor the Business Roundtable knows much more than Learned Hand did about how deterrence or personal liability operate in the corporate or the public arena. Are good people really deterred from taking directorships because of the fear of personal liability? Is it the potential liability or the mere fact of being sued at all that

⁶ *Id.* at 1484-85.

⁷ The Business Roundtable has in fact said it plans to initiate an interdisciplinary study on how boards of directors actually function and what motivates directors to perform better. See The Business Roundtable, Comments of the Business Roundtable Concerning the American Law Institute's Corporate Governance Project (May, 1984). The Roundtable and the ALI disagree, however, on whether all further action on the ALI's Project should await the results of such a study.

⁸ *Gregoire v. Biddle*, 177 F.2d 579, 586 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Disseminated by The Research Repository @ WVU, 1984

prickles? Will the reforms being discussed, limitations of a year's salary for directors' liability or looser standards for dismissals and summary judgements, help?⁹ Increasingly, our society's most important decisions are being made in the corporate boardroom. In these circumstances, the laws affecting the liability and accountability of corporate decisionmakers and their shareholder critics become ever more critical, and the responsibility of our legal system, ever more acute.

Let me throw out a hypothetical with real-life overtones. Suppose you have been a director of an asbestos insulation company since the early sixties when information was beginning to filter in about the product's potential risks to workers and consumers. Now your company is near bankruptcy from product liability lawsuits by those workers, cruelly afflicted with fatal lung diseases. And suppose shareholders seek to hold you responsible for your inaction twenty years ago in not inquiring more deeply into the health problems of asbestos, for not diversifying into other lines, and perhaps for not taking out more ample insurance coverage. By what standards should you be judged? Should it make a difference if the information was never brought to your attention, that you relied on a fellow director's or executive officer's reassurances that the information that did come to your attention was not accurate, or that the board was all the while fighting to keep the company in the black or to stave off a takeover? Or does it matter that a decision to maximize short term profits at the expense of employees' or customers' welfare turned out to be financially disastrous in the long-run to shareholders as well? The hornbook definition of a director's duty of care is well-established;¹⁰ in an industrial

⁹ There have indeed been some economic studies of how boards function in theory and practice in the last decade. See, e.g., PRINCIPLES OF CORPORATE GOVERNANCE § 3.02, reporter's note 1, 2 (Tent. Draft No. 2, 1984) (citing numerous sources) (available from American Law Institute, Philadelphia, Pa.); C. BROWN, PUTTING THE CORPORATE BOARD TO WORK (1976); M. EISENBERG, THE STRUCTURE OF THE CORPORATION (2d ed. 1961); HEIDRICK & STRUGGLES, INC., THE CHANGING BOARD, 1983 UPDATE (1983); M. MACE, DIRECTORS: MYTH AND REALITY (1971); *Corporate Director's Guidebook*, 33 BUS. LAW. 1591 (1978); Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Fama & Jensen, *Agency Problems and the Residual Claims*, 36 J.L. & ECON. 327 (1983); Fama & Jensen, *Separation of Ownership and Control*, 36 J.L. & ECON. 301 (1983); Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976); Leech & Mundheim, *The Outside Director of the Publicly Held Corporation*, 31 BUS. LAW. 1979 (1976); Small, *The Evolving Role of the Director in Corporate Governance*, 30 HASTINGS L.J. 1353, 1372 (1979); Williamson, *The Modern Corporation: Origins, Evolution Attributes*, 19 J. ECON. LIT. 1537, 1565 n.44 (1981). In most of these discussions, however, economic theory rather than empirical data predominates.

¹⁰ The ALI's Tentative Draft No. 3 defines the director's duty to care as the duty "to perform his functions in good faith, in a manner that he reasonably believes to be in the best interests of the corporation . . . and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances." PRINCIPLES OF CORPORATE GOVERNANCE § 4.01(a) (Tent. Draft No. 3, April 1984). It includes the obligation "to make reasonable inquiry in appropriate circumstances." *Id.* § 4.01(b). He does not violate his duty with respect to a business judgment if he was informed with respect to the subject to the extent he reasonably believed appropriate, had no conflict of interest, acted in good faith, and had a "rational basis" for his judgment. *Id.* § 4.01(d). He may rely on other directors or officers or committees to an appropriate extent. *Id.* § 4.01(c).

world in which new hazards are constantly emerging,¹¹ the scope of that duty is less securely defined. The subject I predict, will and should receive a great deal of attention from law reviews and from you as individual lawyers for years to come.

III.

Let me turn to another troubling aspect of corporate decisionmaking intersected and perhaps even skewed by our legal doctrines. Assume that you are a top corporate executive and your company, which produces small electric appliances, has pending a number of product liability lawsuits brought by injured consumers alleging safety-related defects. You have not been sued individually, but you are aware that individual careers are often inextricably tied to the fate of the company. You are also a responsible corporate citizen and you know that whatever the outcome of the lawsuit, some simple technical modifications will make the products safer. Your dilemma has been noted by one legal commentator:

Any act by the manufacturer, however sensible, that can be interpreted as a confession of error may result in a net increase in the manufacturer's exposure in the short run. Thus, safety-related changes in product designs, including product recalls, are likely to generate immediate increases in liability for injuries associated with older designs. Resolving to settle certain categories of claims, or even manifesting a willingness to consider settlement, may have the same effect, insofar as such conciliatory behavior implies that the manufacturer realizes that it has acted unreasonably. Frequently the safest course in the short run, especially if the manufacturer's exposure extends across a fairly broad range of similar products or product applications, is to admit nothing, alter course as little as possible, and offer to settle with no one.¹²

When that happens, rational decisionmaking and the public good become hostage to evidentiary rulings in tort cases. Upwardly mobile corporate executives, judged on their performance at every rung of the ladder, become engaged in what the corporate psychologists might call "deep play," placing negative short-term

Commentators and critics have disagreed as to whether the ALI draft goes beyond existing law in requiring a rational basis and an "informed" director. See, e.g., Comments of the Business Roundtable, *supra* note 7, at 22; PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 9, at § 4.01(a) reporter's note 2; Andrews, *Corporate Governance Eludes the Legal Mind*, 37 U. MIAMI L. REV. 213, 219 (1983) ("The possibility that an innocuous decision made today might be discovered by a court to be wrapped in asbestos some years later, could inhibit the board's decisionmaking under the pressures of time."); Brudney, *The Role of the Board of Directors: The ALI and Its Critics*, 37 U. MIAMI L. REV. 223, 225 (1983); Smith, *Corporate Governance: A Director's View*, 37 U. MIAMI L. REV. 273 (1983).

¹¹ See, e.g., Leeper, *Finding the Bad Actors in a World of Chemicals*, NEWS REPORT, March 1984, at 4, 5 ("[N]ew chemicals are being developed so rapidly that there will probably never be a time when information is available on the toxicity of every chemical in use. . . . [C]ommon wisdom has held that very little is known about most widely used chemicals.").

¹² Henderson, *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U.L. REV. 765, 779 (1983). See generally Symposium, *The Passage of Time: The Implications for Product Liability*, 58 N.Y.U.L. REV. 733 (1983).

implications for their companies and their careers above the long-term benefits to both the company and the public.¹³

Everyday we see in our courts the disastrous results of these do-nothing decisions; litigants are dug-in like armies under siege while the people behind the lines slowly starve. I personally have watched with fascination and dismay the strung out technical defenses—lack of personal jurisdiction, inapplicability of longarm statutes, improper venue, inadmissibility of hearsay evidence—raised by defendant corporations to claims by victims (or their estates) when there was no real question of where, when, or under whose auspices the exposure to a deadly product occurred. It takes a great deal of judicial restraint as well to look neutrally on defendants' callous decisions to reject reasonable offers to settle bona-fide claims for fear of unleashing new claimants.¹⁴ If, indeed, the central purpose of law, tort law included, is to guide rational and deter anti-social behavior, something has gone haywire.¹⁵

Few of you, I venture to say, look forward to that kind of "deep play" decisionmaking which carefully avoids rocking the corporate or legal boat while jeopardizing the health, even the lives, of workers or consumers. As technology advances at a faster rate than human capacity to predict its hazards, such dilemmas will become more, not less, commonplace.¹⁶ We cannot allow the spectre of liability to inhibit responsible corporate action to improve consumer safety.

¹³ Henderson, *supra* note 12, at 766 n.3; L. FULLER, *THE MORALITY OF LAW* at 6 & n.5 (2d ed. 1969). Fuller borrowed the phrase from Jeremy Bentham who used it to refer to the tendency of players in a wagering game of skill and chance to play longer and for higher stakes than their financial circumstances would warrant.

¹⁴ Henderson, *supra* note 12, at 774-75; see also Lombas, McGovern & Green, *Addressing the Problem [of Asbestos Litigation]*, *STATE CT. J.*, Winter 1984, at 19, 23-24 ("One of the major reasons advanced for the low rate of early settlement of asbestos cases involves the value of money over time. . . . [T]here may be a disincentive on the part of some defendants to settle cases rapidly because defense costs are low at the initial stages of discovery and the interest upon retained money is substantial.").

¹⁵ Compare Mintz, *U.S. Judge Assails Officers of Dalcon Shield Maker*, *WASH. POST*, March 2, 1984, at A4, col. 1 (A federal judge accused top officers of manufacturing company of "corporate irresponsibility at its meanest.") with Mintz' *Rebuke of A.H. Robbins Stricken From Record*, *WASH. POST*, Nov. 3, 1984, at G1, col. 1 (The federal appeals court ordered the rebuke struck from the record.).

¹⁶ Some might say most of those problems are already solved by insurance, but I doubt it. First, in generic product cases where a high percentage of people exposed to a product will be at risk, as in asbestos, insurance coverage either quickly becomes unavailable as the number of afflicted mount, or at best, fearfully expensive. Product liability insurance premiums went up 67% in two years in the mid-seventies. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 *N.Y.U.L. REV.* 796, 812 (1983). Conversely, as long as the risk or its magnitude is truly unforeseeable, chances are that many firms will not insure themselves, or premiums will not be high enough to assure prompt payoffs by the insurance companies. Ironically, insurance agencies now feel it necessary to sell insurance on insurance—to pay legal costs for suing the insurance company when it does not pay up.

When a whole industry is at risk, their insurers are also at risk, and they become litigants in their own right. Billions of dollars are currently at stake in insurance coverage of claims against asbestos manufacturers, and legal fights rage among a company's various insurers over the twenty years that

IV.

Let us shift now from the private to the public sector. If Dean Manning is worried about the "sea of uncertainty" in corporate decisions, he should be equally worried about government decisionmaking. Like corporate directors, *many* of the highest level government officials are part-timers too, in the sense that government service is often a temporary tour of duty between career posts. But here the potential liability for a mistake in judgment is very different from in the private sphere. Peter Schuck at Yale Law School has recently written a comprehensive treatise on this topic, entitled *Suing Government*.¹⁷

In sum, Schuck points out, the big difference between private and public liability is that victims of government decisionmaking cannot sue the government, unless it specifically gives its permission, that is, unless it waives sovereign immunity. Thus, historically, individual government employees have been the target of suits based on negligence or intentional misconduct, and the government ordinarily provides no insurance or indemnification against such charges. Of late, some government officials have taken to purchasing insurance out of their own pockets, but that hardly seems fair. The federal government and many states have also passed Tort Claims Acts¹⁸ which substitute the government as a "deep pocket defendant" in ordinary negligence cases when, for instance, a postal truck runs over your pet cat. These laws, however, leave much decisionmaking in government unprotected. The federal law does not cover intentional or most constitutional torts or torts that do not have a basis in state law or torts committed in the military or torts committed abroad or, the biggest exception of all, torts committed as part of the government's "discretionary," that is, policymaking, functions. As to these, the

preceded symptoms of the disease among thousands of its victims:

The question at the heart of the controversy is which insurers should be determined to be "on the risk" for any given set of claimants: insurers who wrote the liability coverage during the period in which the claimants were exposed to the asbestos, or insurers who wrote the coverage at the time the resulting injuries first manifested themselves. Or should some other criterion or combination of criteria be employed? The standard policy language used during the relevant periods is sufficiently ambiguous to support several different interpretations, and courts have reached inconsistent results.

Henderson, *supra* note 12, at 777-78 (footnotes omitted). The failure of the lower courts to reach a uniform interpretation of the standard language used in product liability policies for two decades has thrown the companies and the insurers into chaos; the Supreme Court has repeatedly denied certiorari on the issue. Most discouraging of all, however, is a report that the insurance companies are even now reluctant to change the ambiguous language of the policy because of the effect on pending litigation. This has probably resulted in directly or indirectly denying benefits to millions of claimants. *Id.* at 778. The language may confuse and confound claimants, companies, and courts in perpetuity.

The asbestos fiasco demonstrates that insurance is no substitute for a rational legal system, based on traditional tort law or otherwise, that strives to compensate the injured and deter reckless behavior, while encouraging informed and socially useful decisionmaking.

¹⁷ P. SCHUCK, *SUING GOVERNMENT* (1983).

¹⁸ 28 U.S.C. §§ 2671-2680 (1982).

government decides whether it will provide a defense attorney to the individual government employee, but in no case will it pay the judgment.

Why is enterprise liability, that is, the legal responsibility of the enterprise for the acts of its individual officials, so accepted in the private corporate area but not in the public sphere? Why is insurance and indemnification routine for one kind of decisionmaker and not the other? Why is the test of individual liability in shareholder suits whether the business judgment was "rational," but the test in actions against public officials is whether the official could reasonably be expected to know he was committing a "violation of law"?¹⁹ It is hard to find good reasons. The "law," we do not have to remind ourselves these days, is often highly technical, uncertain, and rapidly changing. Rules and regulations may be opaque, and their meanings may emerge only gradually through case by case adjudication. Thus, Professor Schuck writes:

Increasingly, common sense unaided by detailed legal analysis is a poor guide to what public law requires Sometimes, so much law issues from so many sources—legislatures, agencies, courts, private agreements, and informal administrative practices—that uncertainty increases rather than lessens. Discordant, dispersed messages often produce Babel-like confusion and incoherence.²⁰

That is the law under which individual officials may be held liable. Supposedly there is a heavy cloak of judge-made immunity woven over the past century to cover government officials, but time has also rendered it threadbare. First, *Barr v. Mateo*²¹ said there was absolute immunity for federal officers from common law suits within the scope of their authority; then *Butz v. Economu*²² said, at least for constitutional torts, there was only qualified immunity: the official must have a reasonable good faith belief in the legality of his action. A year ago, *Harlow v. Fitzgerald*²³ said the good faith belief must be *objectively* reasonable—never mind subjective feelings anymore. In the meantime, other cases have said there is absolute immunity for the President but only qualified immunity for presidential aides and state officials, no matter how highly placed.

All of this uncertainty is compounded by the growth of lawsuits against government decisionmakers in the past twenty-five years. One out of every 300 federal officials is currently a defendant in a constitutional tort action.²⁴

I suppose everyone dreads being sued, even if you win or even if someone else pays the bill. As professionals, we usually cherish our reputations more than

¹⁹ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from [civil] liability . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). *Id.* at 818.

²⁰ P. SCHUCK, *supra* note 17, at xiii.

²¹ 360 U.S. 564 (1959).

²² 438 U.S. 478 (1978).

²³ 457 U.S. 800 (1982).

²⁴ P. SCHUCK, *supra* note 17, at 43.

our pocketbooks. There is little solace in being told you have nothing to fear if you have not done anything wrong. Veterans of litigation know differently. The press always seems more attentive when the complaint is filed than when the suit is dismissed. You may never catch up with the time lost in court, or overcome the anxiety, the frustrated and helpless feeling when you have to explain, perhaps for the rest of your life, about the actions brought or still pending against you. One of our most respected and above-reproach attorneys general left office a decade ago with dozens of lawsuits filed against him. Some are still pending.

To complicate matters, a large part of this new litigation is a result of the resurrection of Section 1983, “the remedial fountainhead of today’s public tort law”²⁵ under which government officers can be sued for civil rights violations by plaintiffs ranging from food stamp recipients and prisoners to citizens whose mail was opened or whose phone calls were intercepted by the FBI or CIA, to overly-disciplined school children.

As in the corporate liability field, the courts have been the chief activists of section 1983’s expansion. It has been the courts, too, in the *Bivens* cases,²⁶ which have found in the constitution a private right of action against officials for negligent as well as intentional violations. Section 1983 and *Bivens* have become the bulwark of entire legal reform movements—poverty law, prison reform, and the rights of the mentally ill and the retarded. These plaintiffs have weighty agendas, and they have so far blocked legislative attempts to do away with personal liability in the constitutional tort field, arguing that the government would be less likely to discipline its own bad actors if the threat were removed.

Nonetheless, there are good reasons to rethink the personal liability of government employees. The overriding effect of the law today is to encourage self-protection at every level, bureaucratic CYA (as they say). Self-protection in the government can take many forms: inaction, delay, endlessly “building a record” prior to making a decision, “passing the buck,” suffocating formality, and red tape. Fear of liability affects the character of government decisions at all levels. Professor Schuck writes:

Social workers, for example, may more quickly—but prematurely—remove children from troubled families rather than risk being sued on behalf of an abused child. Parole officers may refrain from recommending release in order to minimize the risk of being sued by potential victims. Supervisors may promote or give glowing recommendations to malingering or disruptive employees in order to be free of them rather than invite a suit for wrongful dismissal.²⁷

I agree with Schuck that both from the viewpoint of the victim who needs compensation and the official who needs freedom to take legitimate risks in uncertain situations, the costs of erroneous government decisions—except in cases of grossly bad

²⁵ *Id.* at xvi.

²⁶ *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁷ P. Schuck, *supra* note 17, at 75 (footnotes omitted).

faith—should be imposed on the agency responsible for recruiting and training employees and implementing policy (and thus best able to prevent widescale legal violations). Unfortunately, we appear to be at a political impasse. It may be too much to expect courts to reverse course after a century of judge-made law on sovereign and individual immunity. Our next generation of government lawyers who will have to make public policy decisions under the shadow of this legal doctrine should be concerned.

The story is told that in 1666 the Mayor of London refused to take certain steps to stop the fire of London because he feared a private trespass action from property owners. It is not clear that we have come such a long way since then.

V.

Let me turn finally to judicial decisionmaking. Judges, of course, have absolute immunity for their decisions under present law. Federal judges have life tenure as well. Our checks are internal ones. We are checked by our own integrity, the respect of our fellow judges, and the authority of an appellate court to reverse our decisions or of our brethren en banc to vacate our decisions. The law reviews can also take us to task for ill-reasoned decisions, but that generally happens long after the fact.

After five years on the circuit bench, I find there are other pressures as well. One that affects many judges is the pure pressure of business. Judges do not always have enough time to give each case its worth in research and reflection. In our court we hear over twenty, usually complex, cases a month, many with records running to thousands of pages. Then we write thirty-five or more opinions a year, some of them hundreds of pages. Every judge is challenged to work to capacity. Capacities differ with age and with energy levels and, perhaps, with experience. I find that it is a job that must constantly be managed. Three law clerks must be delegated jobs, supervised, and their work edited and incorporated into one's own final product. On our court we set our own individual deadlines for handing down opinions. Litigants deserve reasonably prompt justice, and while they do not always receive it, we try to get our opinions out within a few months from argument. On this assembly line, there are always cases that trouble the judge, cases that appear to fall within a clearly defined legal doctrine but which, you suspect, had they been argued or tried differently below or reviewed by a judge with no time limit, might prove to be an exception. But, routinely, we simply do not have the time or the resources to unearth those buried cases in our system. We have to depend almost entirely on the advocates to raise and address the issues. I can tell you that the number of cases that go down on waiver or failure to raise the right point in the right way before the agency or trial court is too high. In an ideal system of justice, that might not be true, but realistically, time and docket pressures very definitely constrict the judge.

The dynamism of collegiality plays an important part in our decisionmaking.

Very often a concurring judge will bend with the majority, thinking it better for

a court to speak with one voice than several. I feel strongly that it is neither necessary nor advisable in every case that the judge voice his or her own special view because it does not coincide exactly with the other judges. Judges are human; they will accommodate those who do likewise. The lone dissenter plays to his own integrity, to history, perhaps to a higher authority, and very occasionally, one suspects, to the law reviews. If one becomes known as a perennial dissenter and a rare compromiser, his or her influence on the court may be discounted. Where you truly believe that you are right and colleagues wrong on the law or on fundamental concepts of justice, then surely you must be true to yourself. But in the majority of difficult cases, the law is not so clearly perceived. We are not infallible, and inevitably, what our respected colleagues, those with open and probing minds, think right, will influence our own thinking. I wish I could say that we have the time to engage in Talmudic-style discourse on our 150 cases a year. But, we do not. After initial conferencing, usually brief, we retire to our chambers and usually work it out alone or with our law clerks as sounding boards and often spurs. There is initial deference given to the judge who produces the draft opinion. Unless other judges disagree with the result or with basic parts of the rationale, they generally concur; they rarely try to rewrite or fine tune the opinion. After a few years, you learn your role on the court as a loner, an inveterate disagreeer, an almost automatic agreeer, or a conciliator able to influence rationales or even results by negotiation. These varied roles, while very important to the law of the circuit, are rarely appreciated or understood on the outside. Litigants look chiefly to how you voted; law reviews, to whether you provided more grist for the mill by a "vigorous" or "strident" dissent that can be used as a launching pad for a note or comment. Thus, judges are perceived very differently inside and outside their own court—another lesson I have learned. Decisions will be influenced a great deal by how much a judge accommodates colleagues or battles them, values the importance of the court's speaking with certainty, views a judge's role as a member of a group or as an individual.

Of course, we judges are bound by precedent, but most difficult cases are unprecedented. That is what makes them difficult. You can, of course, distinguish almost every case from every other. You can also rely on cases that are factually distinct. You can predict what you think the Supreme Court will do next on the basis of what it did last. You can pick and choose rulings from other circuits. But ultimately, your own reasoning and analysis will guide how you characterize the issues in the case and how much you rely on past cases.

This is not to say, however, that a judge decides a case any way he or she wants. Apart from the necessity to convince at least one colleague on an appellate court, and apart from the chastening influence a hearty dissenting colleague can wield, most judges embark on an honest search for what Congress meant to do, whether the agency really was arbitrary or capricious in its decision, or whether the district court clearly erred in its findings. I will tell you candidly that sometimes I cringe at the results for the people involved in cases I decide. I uphold agency policies which I personally disapprove, occasionally even abhor. I believe most other

judges do so as well. But I would be naive to suggest that all judges reason alike. How could they, given their different backgrounds, experiences, perceptions, and former involvements, all of which are part of the intellectual capital they bring to the bench. The cumulative knowledge, experience, and internal bents that are in us are bound to influence our notions of how a case should be decided. I can usually predict whether a colleague and I will agree on the scope of the first amendment, on the boundaries of standing, on what the NLRA authorizes by way of a bargaining order, on what Congress meant when it authorized attorneys' fees under the Equal Access to Justice Act, and so forth.

It is more often the subtle differences in the way judges approach problems that account for their differing positions, not the "judicial activist" or "judicial restraint" labels critics pin on us or, indeed, that we sometimes pin on each other. ("My colleague should show more restraint in this matter; my colleague's activism has no bounds.") I defy anyone to take neutral principles—truly neutral principles—if indeed such exist, and apply them to the decisions in any one term in our court or in the Supreme Court and produce a tabulation that remotely resembles the popular concept of which justices are liberal activists and which are advocates of conservative restraint. So-called conservatives, quite as often as activists, decide issues not raised by the parties, express open dissatisfaction with present law, profess to follow a precedent while chipping it away, articulate new doctrines not urged by the litigants, and overturn agency decisions. Too many commentators ascribe activism or restraint to a judge solely on the basis of whether he or she advocates or opposes particular social, economic, or even judicial doctrines. I will simply say activism or restraint is often in the eye of the beholder who, not infrequently, views friends' and rivals' decisions through different lenses.

CONCLUSION

And with that enigmatic thought, I will conclude. I have not told you much except that important decisionmaking in the private, public, and judicial sectors is hard. Judges are commanded by the Constitution to make vigorous, fair, and just decisions. They ought to be free to do so without fear of transient, irrelevant labels. Those in power positions in industry and government ought to be encouraged by our legal system to make their hard decisions vigorously, not chilled into inaction by fear of financial disaster as a result of lawsuits. Our laws need continuous attention to insure that is so.