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Effective Regulatory Reform Hinges on Motivating the "Street Level" Bureaucrats

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EFFECTIVE REGULATORY REFORM HINGES ON MOTIVATING THE "STREET LEVEL" BUREAUCRAT*

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This issue commemorates the passage, forty years ago, of the Administrative Procedure Act (APA).[1] For forty years this act has ruled the administrative process; it has been little modified, except as to the disclosure of government information.[2] This fact not only demonstrates the resilience of this legislative effort but the failures of subsequent reform efforts. Thus the APA stands as the most successful, if not the only successful, regulatory reform.

Although we may ask why the APA has been so successful, the more important question for modern administrative law is why have other administrative reforms been so unsuccessful?[3] Thus, while remembering the past, administrative law must look to the challenge of the future.

I assert here that substantial improvement in the performance of the administrative process must look beyond structure and procedure. The APA provides an adequate general structure for administrative decisionmaking and hence the subsequent procedural and structural improvements have been confined to refinements and innovations from that provided by the APA. Substantial improvement in the performance of the administrative process must explore new avenues. For

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[1]5 U.S.C. §§ 551–706.

[2]Freedom of Information Act, 5 U.S.C. § 552 (1982); Privacy Act, of 1974, 5 U.S.C. § 552a (1982); Government in the Sunshine Act, 5 U.S.C. § 552b (1982).

[3]"For, to be blunt, the history of American administrative law is a history of failed ideas." J. MASHAW, BUREAUCRATIC JUSTICE 1 (1983).

one thing, the next generation of reform efforts should explore methods aimed at motivating administrative decisionmakers, especially those at the implementing or "street level," to further such goals as fairness, correctness, dignity, and satisfaction.[4]

CRISIS FOR ADMINISTRATIVE LAW

Today administrative law faces a crisis—the failures of the administrative process in important areas of government have been translated into increased rejection of government efforts to humanize modern society.[5] The present state of the law moves many modern thought leaders to advocate abandonment of the administrative process as a tool for solving societal problems.

Those of us who still believe in the use of government to civilize and rationalize our complex society have been involved in a debate, similar to that preceding the APA, over the value of the administrative process. Because the administrative process merely orders those activities whereby government is involved in solving problems, it is merely the tool of a positive state. Thus the debate over the reform of the administrative process, as McGarity explores earlier in this issue, ultimately represents a debate over the acceptable extent of positive government.[6]

In the pre-APA era, hope for a positive state brought about a commitment to government solutions and thereby the rise of the administrative process. Landis, one of the strongest advocates of the

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[4]These values have been expressed in several different ways. I have listed them as fairness to the individual (including individual dignity and satisfaction), responsiveness, and efficiency. C. KOCH, ADMINISTRATIVE LAW AND PRACTICE, § 1.11, at 24–28 (1985). Verkuil has listed fairness, efficiency, and satisfaction. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976). Mashaw lists fairness, dignity, equality, and tradition. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

[5]Mashaw has expressed the dilemma for most of us in administrative law:

> In part the disposition to construct such a vision is a pragmatic response to my personal inability to move firmly into the camp of the cynics. But even if the effort is in some sense a working out of individual psychic need, the exploration seems to have a broader utility. That society has collective needs, at least collective wants, seems inescapable. And, since we lack the altruistic genetic programming of the social insect, these needs and wants can be satisfied only through a bureaucratized application of collective authority. We need somehow to come to terms with our constant demand for institutions—bureaucracies—that once created we then excoriate.

J. MASHAW, *supra* note 3, at 14–15.

[6]McGarity, *Regulatory Reform and the Positive State: An Historical Overview*, 38 AD. L. REV. 399 (1986).

administrative process, wrote in 1938 that the allocation of numerous societal decisions to the administrative process was the result of a natural evolution:

> Two tendencies in the expanding civilization of the late nineteenth century seem to me to foreshadow the need for methods of government different in kind from those that had prevailed in the past. These are the rise of industrialism and the rise of democracy.... And as the demands for positive solution increased and, in the form of legislative measures, were precipitated upon the cathodes of governmental activity, laissez faire—the simple belief that only good could come by giving economic forces free play—came to an end.[7]

When the APA was created there was hope that government had acquired a new tool to combat the adverse effects of a more complex society and the enactment of the APA represented a conceptual victory for government involvement in maintaining a modern society. What Landis and others saw as a tool for civilizing modern society, however, is now seen as a cursed artifact of a discredited regime.

A new attack on the administrative process has emerged from a reinvestigation of some of the same social theories as those which supported opposition to the administrative process prior to the enactment of the APA. What is called deregulation today is grounded in social policy thinking that varies little from that supporting the "liberty of contract" doctrines that held sway just prior to the expansion administrative process.[8] Yet the tone of the debate is different. It is less theoretical and more focused on efficient and effective social decision-making.

Modern, liberal society, however, is based on a delicate balance between government intrusion and freedom of conduct.[9] As Landis observed almost 50 years ago, this balance is compelled by the reconciliation of technology and democracy. As with any balance, time requires adjustments towards new equilibrium. Perhaps we have overbalanced towards government involvement or perhaps old weightings in the direction of certain specific government programs are no longer correct. To the extent that deregulation represents an adjustment and

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[7] J. LANDIS, THE ADMINISTRATIVE PROCESS 7–8 (1938).

[8] F. FRANKFURTER, THE COMMERCE CLAUSE, 75–76 (1964) (epilogue by W. Marshall); *see* H. PHILLIPS, FELIX FRANKFURTER REMINISCES, 297–98 (1960).

[9] "The essence of liberalism is an attempt to secure a social order not based on irrational dogma, and insuring stability without involving more restraints than are necessary for the preservation of the community." B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY, xxiii (1945).

modernization of our mixed economy, it is no doubt beneficial. But care requires that we not overcompensate as we shift the weight away from government.

That social decisions by administrative processes can be superior to alternatives is admitted in the seminal piece in the modern deregulation debate, Coase's *The Problems of Social Cost.*[10] There Coase said:

> The government is, in a sense, a super-firm (but of a very special kind) since it is able to influence the use of factors of production by administrative decision. . . .
>
> It is clear that the government has powers which might enable it to get some things done at a lower cost than could a private organization. . . . From these considerations it follows that direct governmental regulation will not necessarily give better results than leaving the problem to be solved by the market or the firm. But equally there is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency. This would seem particularly likely when . . . a large number of people are involved and in which therefore the cost of handling the problem through the market or the firm may be high.[11]

Therefore, in the modern conflict between the laissez faire approach to societal problems and the efficacy of government institutions, more so than in the same conflict of the thirties, the issue is comparative cost, including error costs, between government decisionmaking and alternatives. The lesson of recent events for administrative law is clear: if the people find your product not worth the cost then they will inevitably go elsewhere.[12]

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[10]Coase, *The Problem of Social Cost*, 3 J. OF LAW & ECON. 1 (1960).

[11]*Id.* at 17–18.

[12]Prior to the enactment of the APA, the debate was among lawyers as to whether the traditional legal processes, the courts, should have decisionmaking responsibility in government programs or whether we should continue to rely on specialized processes included under the umbrella of the administrative process. For example, one of the strongest advocates for the administrative process, James Landis, wrote in 1938:

> Courts are not unconscious of the fact that, due to their own inadequacies, areas of government formerly within their control have been handed over to administrative agencies for supervision. The legislative judgments underlying such a partitioning of government do not always convince. Thus, under the guise of constitutional and statutory interpretation, efforts to thwart the effects of those legislative judgments are not uncommon." J. LANDIS, *supra* note 7, at 123.

Indeed this entire work is designed to extol the superiority in the proper setting of the administrative process over the institutions of government, particularly the courts.

Today the debate is not over which legal process should supervise a particular societal function but whether any legal process should be incorporated at all. The debate today involves the choice between the legal processes, including the administrative processes, and other alternative forms of decisionmaking outside the legal process. The argument is that lawyers and their way of operating do substantial harm. *See* T. MCCRAW, PROPHETS OF REGULATION, 271 (1984). Therefore the deregulation movement which may appear

To make a rational choice, however, the "marketplace" of decisionmaking techniques must compare the lowest feasible cost governmental process with the other decisionmaking alternatives. To assure against a misallocation here, alternative decisionmaking models must be tested against the lowest cost administrative process. If we cannot construct an administrative process that will provide the lowest cost decisionmaking, including error costs and those in the nature of externalities, then society should rationally reject the administrative solution. But administrative law must assure that it has offered society the most cost effective administrative alternative.

The greatest danger is that unnecessary costs, including indirect costs, will compel society to move away from regulation of health, safety, and welfare.[13] These areas are particularly important to humanizing modern society. It is here most of all that administrative law must find the best possible processes or betray the hopes of modern government. Here, where a large number of people are involved, even Coase admits, government decisionmaking may be superior.[14]

For this reason, my criticism of regulatory reform efforts is that they are focused too much on structure and procedure as such. Such solutions seem inevitably to raise the cost of the particular administrative process without commensurate improvement in the delivery of government service. Moreover, these solutions are directed at the operation of the highest administrative levels but they are much less influential over the successful operation at the implementation levels of mass decisionmaking programs. I assert that effective and economical solutions must aim at the conduct of the lowest level decisionmakers and on the development of methods for modifying the behavior of those in the bureaucratic trenches who deal most directly with the public. Follow-

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aimed at the administrative process is in fact aimed at the legal process in general. That is the reason the old wisdom that while Republicans do not regulate they do maintain the market through antitrust enforcement is no longer true. The reason the Reagan agenda is a more complete expression of the public mood than the Democratic agenda, that also supports deregulation, is that the former rejects the legal process as well as the administrative process as a tool for solving societal problems.

[13]Most of these programs are dominated by what Friendly calls "mass justice" processes. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975). The APA covers the processes in only a few of these programs and administrative law (and constitutional law for that matter) has been particularly unsuccessful in its effort to improve performance here.

[14]A good deal of subsequent literature has attempted to prove that the market will work despite the effects of high transportation cost. Nonetheless we should not ignore the possibility that in many cases administrative costs will be less than transaction costs. The laissez faire advocates seem to accept this conclusion in the "theory of the firm" literature arguing against government action to break up large corporations.

ing is a discussion of the regulatory problems from that perspective and a few possible techniques to improve performance at that level.

THE BEST MODEL WILL FOCUS ON THE STREET LEVEL BUREAUCRATS

Regulatory reforms since the enactment of the APA fail because they tend to concentrate on the same task the APA adequately performed some forty years ago. While important innovations have been made since the enactment of the APA, comprehensive structural and procedural reforms have not been able to demonstrate substantial potential for improving the performance.[15] The general structure provided by the APA has proven adequate. A fair conclusion as to the debate between Gellhorn and Davis over the value of generalization[16] may be that the APA has been a useful generalization that has gone as far as structural and procedural generalization can go.

Structure and procedure succeeds only to the extent that the implementors can make it succeed and, hence, the administrative process is at the mercy of the lowest level officials. These officials have been called "implementing"[17] or "street level"[18] bureaucrats. They are the crucial link between the government and those it seeks to serve; for most they are the government.

These implementing officials actually make the decisions that directly affect individual citizens; they represent the point at which the government program actually makes contact with its clients. The term includes decisionmakers such as police officers, schoolteachers, social workers, inspectors, prison officials, drug enforcement agents, and the like.

Effective reform beyond the structure provided by the APA requires close attention to the implementing levels of the bureaucracy. Structural and procedural reforms are often irrelevant to street level performance or in fact can aggravate the problems at that level. Thus administrative law must pay more attention to performance at this level; it must develop better understanding of the behavior of imple-

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[15]McGarity, *supra* note 6, establishes four categories of reform: substantive, structural, procedural, and cognitive. Structural and procedural reforms seem the business of the narrow discipline of administrative law and substantive and cognitive reforms are the business of administrative law study in a broader sense than we usually use the term. C. KOCH, *supra* note 4, at 4.

[16]Personal interview with Davis and Gellhorn.

[17]J. MASHAW, *supra* note 3, at 16–17.

[18]M. LIPSKY, STREET-LEVEL BUREAUCRACY: THE DILEMMA OF THE INDIVIDUAL IN PUBLIC SERVICE (1980).

menting officials and techniques for channeling and adjusting that behavior. Some effort has been made in this direction[19] but more is necessary.

While stereotypes are particularly dangerous here, it is necessary to grasp some generalization about the attitudes of implementing bureaucrats and the atmosphere in which they work. Our understanding of motivations and pressures will disclose why past efforts at structural and procedural reforms have done little to improve government performance at this level, and it might suggest alternatives that may have more potential.

Some negative characteristics of the bureaucracy at the street level are often aggravated by structural and procedural solutions aimed at the top of the process. Other negative characteristics of the implementing level cannot be affected by such solutions. Thus in exploring the potential negative aspects of the lower level bureaucracy, we can identify two categories: those characteristics in which structural and procedural requirements present some potential for doing more harm than good, and those for which structural and procedural requirements tend to be irrelevant.

The atmosphere at the lowest level is dominated by an inherent freedom of action or a "residual discretion."[20] Implementing officials acquire a decisional power which is derived from the absence of any feasible way to monitor the bureaucratic decisions. Peter Schuck found that street level bureaucrats are "actually awash in discretion."[21] He contends that this discretion mocks the formal decisionmaking structure: "Indeed, the lower their position in the agency hierarchy, the more de facto discretion they tend to enjoy."[22] We know this to be true; few of us have not been in organizations in which some clerk had more real authority over us than our nominal bosses.

A pervasive attitude which directly conflicts with this freedom of action is strong risk averseness. The usual exercise of this discretion generally leads not to affirmative abuse, but to a search for sanctuary from its risks. Bureaucrats retreat farther into these sanctuaries as the law and goals of the program are less clear. Uncertainty in communica-

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[19]P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONG (1983); J. MASHAW, *supra* note 3.

[20]I have suggested that administrative law uses the term "discretion" in at least five different ways. Koch, *Judicial Review of Administrative Discretion*, 53 GEO. WASH. L. REV. (1986). The term "residual discretion" here is meant to suggest the way the street level bureaucrats acquire all types of discretion where such discretion is not expressly delegated.

[21]P. SCHUCK, *supra* note 19, at 66.

[22]*Id.* at 66–67.

tion of authority and goals seems inevitable.[23] Hence the implementing officials develop bastions built to avoid the risk inherent in the uncertainty at the implementation stage.

The stress between risk averseness and freedom of action, *i.e.*, discretion, causes many of the failures at the implementing levels. The official with such residual discretion generally retreats into formalism, inflexibility, and inaction. Ironically, procedural and structural reforms often aggravate these negative characteristics.

Implementing officials protect themselves with draconian procedures in order to demonstrate that the exercise of discretion was proper if not expressly authorized.[24] The stress between risk aversion and residual discretion cause an overcommitment to formalism because these conflicting pressures can be somewhat mitigated by a strategy of doing it the "right way."

Formalism, however, is not the worst aspect of this stress for at least there is some movement. The most dysfunctional aspect of the stress is the escape to inflexibility. Wooden treatment of all cases, whether just or not, is substituted for sensitive exercise of the discretion.[25] We have all known the frustration of the bureaucratic slogan: "If I do it for you I will have to do it for everyone." Although the existence of discretion demands a recognition of uniqueness, it is countermanded by an instinct for the sanctuary of inflexibility. Structural and procedural improvements tend to reinforce this type of bureaucratic behavior.

Another sanctuary from uncertainty or hard cases is inaction. Indeed, inaction is the major problem at the implementation stage.[26] Often inaction is the result of variables beyond the street level official's control, such as inadequate resources, but more often the inaction is the result of paralysis brought on by a special kind of fear. Structural and procedural requirements often increase the opportunities for resort to the protection of inaction.[27]

In addition to these negative bureaucratic characteristics which structural and procedural corrections tend to aggravate are those for which such corrections are irrelevant. Structural and procedural reforms have little or no impact on the lack of personal commitment, absence of responsibility, and narrow vision.

The lack of personal stake in the performance of the program

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[23]J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT, 78–80; 93–94 (1978).

[24]P. SCHUCK, *supra* note 19, at 73–74.

[25]*See* S. BREYER, REGULATION AND ITS REFORM, 82–83 (1982).

[26]P. SCHUCK, *supra* note 19, at 71–73.

[27]*See id.* at 72.

creates both positive and negative opportunities for the system. Schuck suggests that the "zone of indifference" opens officials to positive inducement and allows the system to influence their conduct.[28] However, insulation inherent in a public bureaucracy more likely removes some of the natural personal incentives that drive private bureaucracies. In short a government bureaucrat can more confidently trade safety for performance.

Similarly, implementing officials can find numerous techniques for deflecting responsibility. Being at the bottom, they can rationalize that breakdowns are due to the conduct of those higher up or to the "system" over which they have no control.

Narrowness of vision is also a consistent complaint against the implementing officials. The street level bureaucrat inhabits a small, often secluded, niche in an administrative program. Not only does this niche provide protection from responsibility but it narrows the official's view considerably. A major failure at the street level is ignorance of the aspect of the program's mission the particular decision serves. The implementing officials lack a general picture of the total program and hence do not fashion their decisions with the overall administrative plan in mind.[29]

Procedural and structural reforms have not dealt well with these behavioral elements. When we look at reform as a problem of motivation, we suspect that structural and procedural reforms have significant potential for aggravating characteristics of formalism, inflexibility, and inaction, and are largely irrelevant to the improving personal commitment, responsibility, and narrow perspective. Thus we must look at other solutions to these problems.

These solutions must be based on behavioral concepts and understanding of a very unique type of personnel management. Personnel management is difficult at best; it is particularly difficult to construct generalized models to work in the public bureaucracy.

A special caution is necessary in this regard: Although we often refer to the government as if it were a monolith, the people who serve in it are diverse.[30] They vary in ability and attitudes, they relate to each other in a variety of ways, they relate to their organization and institutions in general in different ways. They are individuals. Some are diligent and extremely able, some are average, and some are awful. The process must motivate the average or indolent and control the

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[28]*Id.* at 126.

[29]*See* J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE, 22 (1982).

[30]P. SCHUCK, *supra* note 19, at xviii.

miscreants without unduly stifling the able and hardworking. Not an easy management task in the best of circumstances and the administrative process is far from the best context to implement such solutions.

Moreover, as Landis observed almost fifty years ago: "In the business of governing a nation . . . we must take into account the fact that government will be operated by men of average talent and average ability and we must therefore devise our administrative processes with that in mind."[31] We cannot propose a management approach built for paragons.

Nonetheless, several techniques might contribute to motivating better performance from these officials. First, we might use the legal process to improve the management of implementing officials. Second, we might consider guidance and cooperation as a tool for adjusting conduct and motivating performance.

LEGAL PROCESS DEVICES FOR MANAGING THE BEHAVIOR OF STREET LEVEL BUREAUCRATS

The law is experienced in controlling and modifying the behavior of diverse individuals. Thus we may be able to use the legal process to manage the behavior of street level bureaucrats. The key then is to find ways that the legal process can mold their behavior.

Management through a comprehensive public tort system. Public tort liability is one way the legal process can be used to manage the behavior of street level bureaucrats. While victim compensation and spreading the loss are important goals of a public tort system, they are secondary to the objective of controlling the activities of government officials and deterring misconduct. The public tort system is a form of communication from society to the officials.[32]

Until relatively recently, the doctrines of sovereign immunity and official immunity have combined to stifle the evolution of a public tort system.[33] Even the Tort Claims Act[34], enacted about the time of the enactment of the APA, was too narrow to allow the development of a body of law aimed at government decisionmaking, even low level decisionmaking.

The contraction of the doctrine of sovereign immunity, both by

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[31]J. LANDIS, *supra* note 7, at 87.
[32]P. SCHUCK, *supra* note 19, at 123.
[33]B. SCHWARTZ, ADMINISTRATIVE LAW, § 9.22, at 568–71 (1984).
[34]Federal Torts Claims Act of 1946, 28 U.S.C. §§ 2671–80 (1982).

judicial invention and legislative waiver,[35] has recently opened the way for the development of a comprehensive public tort system. Added to that, public officials, with some exceptions, are now under only a qualified, good faith immunity.[36] Even the Tort Claims Act has been broadened to encompass a greater variety of government activities.[37] The *Bivens* doctrine[38] includes constitutional torts and *Wood v. Strictland*[39] set the stage for damage actions based on due process violations.[40] The amendments to federal question jurisdiction provide the jurisdictional base for the development of nonconstitutional public tort law.[41]

There is little now that stands in the way of a comprehensive public tort system. The task is to describe the objectives of that system. While compensation is important, the primary objective should be to deter misconduct and promote sound administrative decisions at the lowest level.

Some have urged that a public tort system can best serve this objective by holding decisionmakers directly liable. They contend that unless officials themselves are held personally liable tort actions will have no real deterrent effect.[42]

Rather strong arguments, however, have been made that government liability, not personal liability, will be more effective.[43] Peter Schuck argues very persuasively for this position.[44] He does a very careful job of examining the pressures and motivations of street level bureaucrats. He also observes that the dominant characteristic is risk aversion. This risk aversion leads the bureaucrat to overcompensate for risk and hence to overrespond to the possibility of liability. The average street level bureaucrat's risk computation then will greatly overestimate probabilities that his conduct will be considered improper. This mistake will adversely skew the official's actions.

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[35]5 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 27:2, at 6–14 (2d ed. 1984).

[36]*Id.* at § 27:18, at 97–100.

[37]*See, e.g., Federal Tort Claims Act: Hearings on S. 1775 Before the Subcomm. on Agency Administration of the Senate Judiciary Comm.*, 97th Cong., 2d Sess. (1982) (testimony of Donald J. Devine, Director, U.S. Office of Personnel); Bell, *Proposed Amendment to the Federal Tort Claims Act*, 16 HARV. J. ON LEGIS. 1 (1978).

[38]Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[39]420 U.S. 308 (1975); *see also* Carey v. Piphus, 435 U.S. 247 (1978).

[40]ACUS, Federal Officials Liability for Constitutional Violations (Rec. No. 82–6), 1 C.F.R. § 305.82–6.

[41]The APA expressly excludes damage actions. 5 U.S.C. § 702.

[42]While direct liability would be expected to increase the deterrent effect, it is conceded that it will lessen the chances for victim compensation.

[43]Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981).

[44]P. SCHUCK, *supra* note 19, at 99.

As previously stated, risk aversion and uncertainty in the exercise of residual discretion results in formalism, inflexibility, and inaction. Thus a public tort system that holds the official personally liable will have adverse consequences, particularly in the loss of individualizing and the retreat to inaction.

Therefore, Schuck supports the notion that institutional, rather than personal, liability is preferable. He would incorporate the concept of respondeat superior into the public tort system.[45] This means, not just that the government will be liable, but that the agency that employs the individual will be responsible. Indeed he would take the damages out of the agency's own budget.[46]

This strategy would motivate vigorous supervision and sound personnel practices. Davis, in *Discretionary Justice*,[47] found:

> Possibly the most important check of discretionary action is simply the normal supervision of subordinates by superiors. . . . Obviously, sufficient supervision can be a good protection against arbitrary exercise of discretion.[48]

In the mass justice agencies particularly, affirmative action by superiors is more likely to adjust the behavior of street level bureaucrats than court supervision through a personal liability system.

Still, the danger in a public liability system, even one based on government respondeat superior, is the sanctuaries of formalism, inflexibility, and inaction. Not only bureaucrats, but bureaucracies, are extremely risk averse. Inevitably these sanctuaries provide protection and hence any increase in the probability of liability will increase the withdrawal into one or more of the sanctuaries. The jurisprudence that is created by this public tort system must face this major difficulty.

Therefore, balance requires that if we create a comprehensive public tort system we must incorporate equal liability for acts of omission and commission. In this regard, perhaps this system could explore the experience of a group of private sector bureaucrats, corporate insiders. Much of the liability imposed on them by securities regulations laws, particularly rule 10b-5 litigation, centers on omission not commission. Perhaps some of this law can form the basis for public liability. Federal courts are already very knowledgeable and experienced in this body of law.

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[45]*Id.* at 82.

[46]This would, of course, punish those who are to be served by the agency, but anyone who has been in government will know the impact of this on the managers of the agency. Imagine going to the relevant budget subcommittee with a line item for damage awards.

[47]K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

[48]*Id.* at 143.

A respondeat superior doctrine then would be a threshold for the creation of a public tort liability system. This system would focus on developing liability theories that promote the goals of the administrative program and communicate to the street level bureaucrats the societal values they are to further. Once through the threshold we then must be prepared to develop a body of law with this purpose in mind. This body of law must be based on knowledge of the attitudes and motivations of the lower level officials; it cannot be abstract.

Judicial review as management. While expansion of damage actions may increase courts' ability to affect the behavior of bureaucrats, the judicial review function also holds some promise. Judicial review, especially procedural review, has an effect on the management of agency personnel. Effective judicial review, like effective tort liability, requires judicial sensitivity to the prospective affect of judicial action on those who actually implement the ruling.

There is a significant question as to whether judicial review can monitor the quality of individual administrative decisions, particularly in mass justice programs.[49] But, judicial review, like institutional tort liability, can compel motivational techniques on the part of the agencies. Mashaw observed: "This in no way suggests that [judicial review of] a well-designed quality assurance system is not an extraordinarily useful management tool for discovering apparent trouble spots, for providing continuous feedback to decisionmakers, and for promoting consistency across deciders."[50] Therefore reviewing courts could have some impact on street level bureaucrats if they focused on the implementing level of a program.

Weaknesses of legal process management techniques. The legal process faces several difficulties in taking this management approach. Although courts can contribute something to motivation of street level bureaucrats and can encourage agencies to pay closer attention to this aspect of their jobs, the nature of the legal process limits this contribution.[51]

For one thing courts are not presented with the information necessary to make such judgments. The records and arguments presented to courts do not contain information about the motivational effects of alternative judicial action. Judges are in a passive position. They have no investigative powers and they are not provided with the powers to obtain general information.

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[49]Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1295 (1975).
[50]J. MASHAW, *supra* note 29, at 136.
[51]*Id.* at 139–40.

Moreover, there is no evidence that judges would consider such evidence if it were presented. They see their function as confined to the solution of the case before them. They rarely get involved in analyzing the general behavior that brought about the individual controversy. Judges are in a reactive position; they are to do individual justice in the case before them. Their function is necessarily retrospective.

At the other end, courts find it very difficult to communicate their judgments on such matters to the lower levels of the bureaucracy. They must, and naturally do, direct their pronouncements to the heads of the agency and there is a good deal of "slippage" between that communication and the implementing stage.[52] As Schuck observed: "Unfortunately, procedural innovations can no more eliminate these judicial communications barriers than can the informational ones, and they may even make matters worse."[53]

There is another significant problem with judges involving themselves in the management of lower level government employees. As Schuck observed, judges have a strong class bias.[54] Whether they are born to it or rise to it, they are representatives of a higher class and defenders of the judgment of their class. They have little empathy for the situation of the lower level bureaucrat or sensitivity to the exchange between those officials and their clients.

Nor do they have expertise in managing implementation of bureaucracies. The curious fact is that federal judges rarely have administrative experience.[55] Trial experience is generally considered a prerequisite to appointment to the trial bench because it is the relevant experience. Yet federal judges, especially appellate court judges, spend a vast amount of their time dealing with administrative programs and there is no effort to assure they have experience in the trenches with the administrative process.

Thus while a judiciary sensitive to the management aspects of their job could make a valuable contribution through a public liability system and judicial review, they face substantial difficulties in an effort to do so. For this reason, a system of managing street level bureaucrats cannot be based totally on judicial actions.

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[52]P. SCHUCK, *supra* note 19, at 5.
[53]*Id.* at 163.
[54]*Id.* at 158.
[55]*Id.*

A SYSTEM OF POSITIVE MOTIVATION THROUGH GUIDANCE

In addition to the above defects in the legal process as a management tool is the fact that it can create only negative incentives. The black letter law of personnel theory dictates that positive incentives, particularly for educated and upper level personnel, are much more effective than negative incentives.

Of course a little creativity could employ the judiciary in a system of positive motivations for street level bureaucrats. Indeed that is what Schuck had in mind with a respondeat superior based public tort system; the liability system would motivate the agency managers to fashion programs to motivate proper lower level performance.[56] Certainly judicial review also could be structured so that it would have much the same objective. However, the indirect impact of the judicial action, even in these systems, diminishes effectiveness considerably.

An advisory code of professional conduct for government officials. The task for regulatory reform then is to find a more positive and supportive approach to motivating good conduct on the part of street level bureaucrats. One approach that seems natural for administrative law is advisory rulemaking: a code of professionalism for low level government decisionmakers.

Government lawyers receive some guidance as to ethical conduct.[57] The ABA's new model rules make a better effort at recognizing the special problems of government attorneys.[58] If one were to choose a limited number of rules and related comments, the model rules can be said to have chosen the best ones.[59] A broader effort to deal with government attorneys is the Federal Bar Association's rules.[60] Both of these, however, cover only government lawyers, acting as lawyers, and hence cannot serve in the capacity suggested here.

One effort encompassing all government employees began with the Ethics in Government Act.[61] From this has arisen the Office of Govern-

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[56]Schuck would add "management rules" promulgated by the relevant agency to the public liability system. *Id.*, at 143–45.

[57]C. KOCH, *supra* note 4, § 1.13, at 30–35.

[58]ABA, Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983.

[59]Rules 1.11 and 1.12; Comments to Rules 1.6; 1.10; 1.13; 3.9; 5.1; and 8.2.

[60]FBA, Canons of Professional Ethics (1972); *see* Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 ABA J. 1541 (1974).

[61]Ethics in Government Act, 92 Stat. 1824 (1978).

ment Ethics.[62] This agency is in the process of generating broader and broader rules relating to ethical conduct by government employees.

While these are all necessary steps to improving the integrity of government, they do not offer the positive guidance necessary to promote better low level government decisionmaking. Thus my proposal will not be aimed at ethical conduct but at guiding sound government decisionmaking. It will not be limited to lawyers but will include a larger group: professional implementing officials.

The goals of a code of official professionalism. A code of professionalism for government decisionmakers would offer a whole new technique for bringing about regulatory reform. And it would aim the reform where it will have the most effect: the implementing decisionmakers. It would improve government decisionmaking in several ways.

First, a code of professionalism for government decisionmakers would begin the long overdue study and discussion of techniques for guidance of lower level decisionmakers. The process of creating the code itself will further this goal.

The process of drafting the code will force many individuals and groups to focus on the problems of the frontline actors in the administrative process. It would be particularly useful for groups such as the Administrative Law Section of the ABA and the Administrative Conference to undertake this study.

Developing the code should bring together as many approaches and disciplines as possible. Administrative law, for example, has not made very good use of the growing body of relevant behavioral research.[63] While we sometimes refer to social science materials, we rarely incorporate them into decisions about how the process should work.

The code will further the discussion and education within the "profession." After promulgation, the code would provide a forum where-

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[62] The Ethics in Government Act . . . established the Office of Government Ethics in the Office of Personnel Management to provide overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.

The Office develops, in consultation with the Attorney General and the Office of Personnel Management, rules and regulations to be promulgated by the President or the Director of the Office of Government Ethics pertaining to the identification and resolution of conflicts of interest;

Monitors and investigates compliance with public financial disclosure requirements of title II of the Ethics in Government Act of 1978 . . . ;

Orders corrective action on the part of agencies and employees which the Director of the Office of Government Ethics deems necessary; and

Provides information on and promotes understanding of ethical standards in executive agencies.

The U.S. Government Manual 1985–86, at 601.

[63] S. BREYER, REGULATION AND ITS REFORM, 9–10 (1982).

by seminars and workshops would be developed to discuss compliance and perhaps delve more deeply into proper decisionmaking. These workshops would add detail by examining the code in the context of specific problems. At the least, it will institutionalize a communication process whereby lower level decisionmakers would exchange information among themselves and those outside government.

The code will also create an atmosphere of professionalism among government officials. The aim will be for cooperative attitude by government officials to further the goals of the code. The law, as a behavioral discipline, tends to undervalue the impact of cooperative conduct and social expectations. Potential individual deviations from professional codes, like those in the legal profession, should not cloud the fact that most professionals will voluntarily comply with professional standards of conduct. Lower level government officials will act in the same manner as most other professionals and, if presented with a realistic code of professional standards, will try to comply. Even if the enforcement of the code is sketchy, voluntary compliance will make it generally effective.[64]

Indeed the code will have the special benefits of creating a new class of professionals who will acquire the pride of professionals in their work.[65] Defining government officialdom in professional terms will improve the self-image of street level bureaucrats. It is often suggested that high regard of continental bureaucrats improves the performance of European bureaucracies.[66] A similar attitude would improve the performance of American bureaucrats.

Yet, where formal enforcement is undertaken, the code will serve as a basis for the enforcement actions. The code will provide concreteness upon which lawsuits can be based. And even if formal enforcement is sketchy, the risk averseness of most government officials will give any enforcement of the standards added formal impact.

On the other hand, an advisory code will increase the fairness of enforcement actions. Tort liability, either against the individual officials or the agency, is rarely preceded by adequate notice as to proper conduct. Besides some high sounding rhetoric, sanctions against individual officials at this point are based on *post hoc* standards.[67] A code would fill in the detail and bureaucrats can be held to more clearly articulated decisional standards.

The professional codes can provide protection for those who con-

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[64]P. SCHUCK, *supra* note 19, at 68 (describing a "duty threshold").
[65]J. MASHAW, *supra* note 3, at 26 ("The goal of the Professional is to serve the client.").
[66]*E.g.*, L. BROWN & J. GARNER, FRENCH ADMINISTRATIVE LAW, 15–17 (2d. ed. 1973).
[67]P. SCHUCK, *supra* note 19, at 94.

duct themselves properly. As lawyers use professional standards to deflect pressures from their clients, so street level bureaucrats could use this code for protection from similar pressures from their "clients." A code of professionalism for government decisionmakers will give officials a safe harbor from citizen and special interest pressures.[68] Interestingly, one of Schuck's examples of the pressures faced by frontline bureaucratic decisionmakers is deadline pressure on NASA's frontline employees.[69] A code provision that established a professional duty that enabled the NASA decisionmakers to resist outside pressures might have saved lives and, ironically, performed a great service to the agency.

SOME THOUGHTS ON THE CONTENT OF THE CODE

This piece is, if anything, a preliminary inquiry. My hope is to generate thought, study, and comment about a guidance approach to improving the performance of some administrative decisionmaking processes. Therefore, I am not prepared to offer a fully developed advisory code of professional conduct for government officials. However, I might suggest some ideas as to what the code might deal with and how it might be constructed to further goals that have not been furthered by structural reforms.

Dominant is the observation that structural and procedural approaches have not been successful in furthering several basic values inherent in government decisional process, particularly in the context of "mass justice" programs. These programs necessarily confer a substantial amount of individualizing discretion on street level bureaucrats.[70] Efforts to structure and confine this discretion inevitably reach the point of diminishing marginal utility: the more this is done the more the system loses its ability to do individual justice. As suggested above, such solutions tend to aggravate the negative characteristics of implementing bureaucracies, such as formalism, inflexibility, and inaction.

The structural and procedural requirements at the implementing stage, are not in fact, well defined. The APA does not cover most of these processes because it has no provision for informal adjudication. Most of the structure and procedure, therefore, is derived from the due process clause of the Constitution.

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[68] *Id.* at 67–68.
[69] *Id.* at 77.
[70] *Id.* at xvii.

The law here is in disarray.[71] It is firmly established that there is a two-tier analysis.[72] The first tier of analysis determines whether due process is required because the government is attempting to deprive an individual of life, liberty, or property. Great progress has been made in redefining property and liberty interests. Once it is determined that a property or liberty interest is involved, the second tier of analysis determines what process is due. Despite some extremely thoughtful commentary, however, the law as to this question has not even established a method of analysis. I submit the reason is that generalized procedural prescriptions cannot alone attain the goals identified for these informal decisionmaking systems. Perhaps a code of conduct for those making frontline decisions in these programs would assist in furthering these goals.

There have been some searching inquiries into the values to be served by mass justice procedures.[73] Several of these values are not susceptible to structural or procedural implementation but may form the basis for developing guidance and cooperative conduct by implementing officials.

Both Mashaw and Verkuil identify a value of dignity or satisfaction.[74] Indeed Mashaw has lumped the current approach to due process into what he terms the "dignity mode."[75] It seems unlikely that procedures can be designed to further satisfaction or dignity, but the officials may conduct themselves in ways that will further these goals. The dignity/satisfaction type values suggest some possible code provisions.

The code could admonish the street level bureaucrat to create an air of caring and sensitivity as well as impartiality. Mashaw observes that people really can distinguish between losing and being treated well.[76] At the street level, the attitude of the bureaucrat is the most important factor in this judgement.

The street level bureaucrat has a good deal of individualizing discretion.[77] The code could advise on how to use that discretion. The

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[71]*See generally* J. MASHAW, *supra* note 29.

[72]C. KOCH, *supra* note 4, § 7.21, at 563.

[73]Verkuil, *supra* note 4; Mashaw, *supra* note 4; Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978); Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS, NOMOS XVIII, at 126 (J. Pennock & J. Chapman eds. 1977); Thibault & Walker, *The Relationship Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401 (1979).

[74]Verkuil, *supra* note 4, at 753 (A just process is "one where the locus of control remains in the parties.").

[75]J. MASHAW, *supra* note 29, at 162.

[76]*Id.* at 163.

[77]Koch, *supra* note 20.

bureaucrat should know the limits of his discretion and strive to use it wisely and flexibly without undue formalism. On the other hand the bureaucrat should assure that the applicant understands the limits of his power and any additional rights that the applicant may have.

Consistency is another major contributor to furthering the dignity/satisfaction values. A study of the Social Security Administration hearing process observed:

> While there is no adequate means for determining how much it is worth to achieve consistent results, the demoralization costs (alienation, distrust, loss of faith in government) associated with current widespread belief that disability decisions are arbitrary, are likely to be quite high.[78]

Yet, as one commentator on human behavior observed: "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines."[79] The operative word in this truth is "foolish." Individualizing discretion is the administrative law cure for foolish consistency.[80] With that protection, an administrative program could safely strive for consistency.

Consistency in any program that requires a number of decisions, the mass justice programs, is extremely difficult.[81] Rulemaking can improve the chances for beneficial consistency but it can only go so far. Generalized procedures to further consistency are more likely to push the individual decisions into the "foolish" category.

The virtues of sound consistency may be more readily attainable through a commitment by implementing officials. Surely they can strive to be consistent in their own decisions where the circumstances permit. And they can strive to be consistent within their office or region. They can seek ways to obtain consistency throughout the program. Communication with other officials and attendance at conferences, for example, can help improve consistency throughout the program. They can be admonished to broaden their knowledge of the programs and incorporate a broader perspective into their individual decisions. Some beneficial consistency can be added to the programs without resort to wooden decisionmaking.

As noted, inaction is a constant complaint against the street level bureaucrat. Inaction adds substantially to the dissatisfaction with these

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[78]MASHAW et al., SOCIAL SECURITY HEARINGS AND APPEALS, 19–20 (1978).

[79]Emerson, *Self-Reliance*, THE OXFORD DICTIONARY OF QUOTATIONS, 200:40 (2d. ed. 1955).

[80]Perhaps the most positive sense of the term discretion is the power to make individualizing adjustments. Koch, *supra* note 20.

[81]Mashaw, *supra* note 4, at 44–45.

processes. Judicial review and management rules have been ineffective in assuring timeliness.[82] However a standard of conduct may have some effect on creating a drive for timeliness.

Other code provisions could deal with even more emotional aspects of the dignity/satisfaction values. For example, the code could provide direction on how to speak to applicants. Sexual or racial reference, for example, could be made improper professional conduct. Demeaning references could be avoided. More subtle and detailed information about the emotional aspects of such proceedings from the applicants' point of view could be incorporated in the code.

Dignity/satisfaction values are bound up in expectation and people's expectations are schooled by a longstanding sense of appropriateness. Thus those values lead to another identified value: tradition.

Tradition and related issues should affect due process.[83] Indeed Mashaw has described a major group of due process cases and commentary as fitting under the "appropriateness model."[84] The code could command the implementing official to provide procedures that society would ordinarily consider appropriate. But it could do more than that; it could assure that these "appropriate" or traditional procedures are not reduced to mere formalities.

For example, the code could reaffirm the need for real and understandable notice. It could admonish the implementing official to assure that the opportunity to participate is not clouded by confusing formality. It is clear that those caught in administrative processes often find them incomprehensible. The bureaucrat can, in the context of the traditional formalities, assure that the applicant actually feels part of the process that resulted in the decision.

Another traditional procedural requirement can be used to further the values of due process: reason.[85] The reason requirement in the hands of a sensitive bureaucrat can do more than satisfy the formal due process requirements. A sensitive official will assure that the reasons are in fact understandable to the applicant, that the applicant knows why the action was taken. A professional implementing official will assure that the "client" is satisfied that a sound, if disappointing,

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[82]*See, e.g.*, J. MASHAW, *supra* note 3, at 42–43.

[83]Mashaw, *supra* note 4, at 54.

[84]J. MASHAW, *supra* note 29, at 48 ("The model of appropriateness begins with tradition. . . .).

[85]Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 79 (1976) ("[I]t is essential that we retain the core safeguard against arbitrariness, the right to receive a meaningful explanation of what is being done to the individual.")

decision was made. The code could charge the bureaucrat with a duty to assure that the reasons for the decision are actually communicated to the applicant.

One of the most complex values served by the administrative process is correctness.[86] Accuracy in this context is so hard to measure and achieve that we often retreat into an unrealistic trust of procedural guarantees. Yet there is no evidence that any of the adversarial elements actually adds to the accuracy. Nor do the clients of the administrative process confuse procedural correctness with actual correctness.

The code could create a duty to do what is reasonable with the resources available to make accurate decisions. Professionalism, it could note, often means doing more than is formally required. A code could be of considerable help in guaranteeing a satisfactory search for accuracy and some help in achieving it.

In short, structural and procedural solutions can only go so far in furthering some of the guiding values of the administrative process. These values, however, could be enhanced by guidelines to those actually making the decisions and in this way several of these values would have a better chance for fulfillment. These values could be pursued with less risk of aggravating the negative bureaucratic characteristics.

CONCLUSION

Already there is considerable popular dissatisfaction with loosening of control of business. The combined force of the retreat from deregulation and the continued demands on agencies to solve other social problems will raise again the demand for improvements in the administrative process. If a new era in the evolution of government involvement is emerging, then a renewed demand will be made on administrative law to find ways to deliver the services, including decisionmaking services, expected of modern government. I suggest here that new approaches to answer this demand must be explored and one new avenue will seek techniques for motivating implementing or street level bureaucrats.

As Smythe suggests in her piece in this issue, the reigning view today is that we began delving into the mysteries of the evil device of the administrative process in 1887 with the creation of the ICC.[87] Like the ICC, however, the *Harvard Law Review* began in 1887. It would be

[86]MASHAW et al., *supra* note 78, at 13–19.

[87]Smythe, *An Irreverent Look at Regulatory Reform*, 38 AD. L. REV. 451 (1986).

more apt to blame it, not the ICC, for starting the processes at which modern deregulation is aimed, for that journal represents the beginning of a massive and lasting commitment by lawyers to make the legal process responsive to the problems of modern society. One of the concepts that has been part of that search is the administrative process. At least at the time of the creation of the administrative process, this concept was seen as a vehicle for a positive contribution by the legal process; one of the several ways the legal process can be employed to correct the abuses that one segment of society could, without government intervention, impose on other segments of society.

The task then is for administrative law, and the groups that contribute to its development, such as the ABA's Section of Administrative Law, to respond to the current dissatisfaction. One idea, suggested in this piece, is an advisory code of professionalism for government decisionmakers, with special attention to those decisionmakers that labor in the trenches of the administrative process. The strategy of such a code is that clearer standards and the motivation of professional pride will result in voluntary behavior that will improve some aspects of implementing decisions. The consequence may be more trust of the administrative process to further many of the goals of society.