Issues in Legal Scholarship

THE REFORMATION OF AMERICAN ADMINISTRATIVE LAW

2005 *Article* 4

Structuring a "Dense Complexity": Accountability and the Project of Administrative Law

Jerry L. Mashaw*

*Sterling Professor of Law and Management, Yale University, jerry.mashaw@yale.edu

Issues in Legal Scholarship is one of The Journals of Legal Scholarship, produced by The Berkeley Electronic Press (bepress).

In his classic article, *The Reformation of American Administrative Law*,[1] Richard Stewart identified the task of administrative law, as legitimating "through controlling rules and procedures, the exercise of power over private interests by officials not otherwise formally accountable." [2] He then elaborated the way in which legislative standards, administrative decisional procedures, and judicial review sought to ensure the instrumental rationality of administrators' decisions and thus reconnect unaccountable administrators with electorally accountable expressions of legislative will. But, Stewart argued, this "transmission belt"[3] view of administration and administrative law failed to describe the reality of administration. Hence the tools of administrative law had to fail in their crucial task of legitimating administrative action by making administrators accountable to law. Once it was recognized that administrative agencies were engaged, not in instrumentally rational implementation, but in the "essentially legislative process of adjusting the competing claims of various private interests affected by agency policy,"[4] the transmission belt theory collapsed.

The heart of Stewart's article is then a description and critique of administrative law's attempts, primarily through judicial action, to reconceive the structure of agency accountability. By recognizing new interests based in legislative entitlements and broadening access to judicial review, courts, in Stewart's view, had reimagined agency accountability as a process of pluralist interest representation. The micro-politics of participation would substitute for the macro-politics of assembly decisionmaking. But Stewart was deeply skeptical about the success of this new paradigm of administrative legitimacy.

A host of problems beset the interest representation model. Agency interest balancing, detached from legislative bargaining, challenged core conceptions of democratic accountability. Moreover, Stewart doubted that this model could produce both fair and workable administrative processes. Many interests seemed destined to remain under-resourced and under-represented. And, accommodation or balancing of interests may be the antithesis of the development of stable and coherent administrative policies. Echoing Theodore Lowi's complaints about the lack of authoritativeness of American public law,[5] Stewart

---

[1] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) [hereinafter "*Reformation*"].

[2] *Id.* at 1671.

[3] *Id.* at 1675.

[4] *Id.* at 1683.

[5] THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC

questioned the capacity of courts, as legal institutions, to supervise an administrative process understood as a process of micro-political bargaining.

In one of the many prescient passages in the article, Stewart anticipated that judicial policing of interest representation was likely to produce ad hoc and unpredictable outcomes which would intolerably burden the making and execution of administrative policy. His beautifully-crafted, but dour, final sentence advised that "we can know only that we must spurn superficial analysis and simplistic remedies, girding ourselves to shoulder, for the indefinite future, the intellectual and social burdens of a dense complexity."[6]

Contemporary Anxieties

There is no escaping the overall impression left by R*eformation*. Understood as a project of making administrators accountable to the legislative will, administrative law was failing. The old transmission belt model was in tatters; and, whether others could see it or not, Stewart was clearly predicting that its successor, interest representation, would suffer a similar fate. But that was then and this is now. Has Stewart's "dense complexity" persisted, and along with it a sense of unease about the legitimacy of administrative action? Or has some new model of administrative accountability emerged to make administration both efficacious and legitimate?

This is hardly the place to rehearse the last thirty years of developments in American administrative law, but my sense is that little has improved and new problems have emerged. To a limited extent, the judiciary has retreated from the process-demanding and beneficiary-empowering jurisprudence of the 1960s and 1970s.[7] But few believe that this has had any substantial impact on the

---

AUTHORITY (1969).

[6] *Reformation*, *supra* note 1, at 1813.

[7] Only a year after Stewart wrote, *Mathews v. Eldridge*, 424 U.S. 319 (1976), signaled the Supreme Court's growing skepticism about the "entitlements" jurisprudence whose poster child was *Goldberg v. Kelly*, 397 U.S. 254 (1970). But there is no clear agreement about the degree to which due process rights were actually effective means of empowering the beneficiaries of public programs, *see, e.g.*, William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983), or how much retrenchment on adjudicatory process guarantees has resulted from subsequent cases. *See, e.g.*, Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996). Similar signs of partial retrenchment from the broad language of *Ass'n of Data Processing Serv. Orgs, Inc. v. Camp*, 397 U.S. 150 (1970), are visible in the standing jurisprudence. Although again the developments in standing doctrine have been so complex as to suggest virtual incoherence, it seems reasonably clear that retrenchment has been very much in the direction of limiting the standing of program beneficiaries. *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163 (1992); and Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985). In other areas retrenchment has been more

immobilizing potential of broad and vigorous participation in administrative processes backed by legal sanctions.[8] Indeed, representation reinforcing judicial review is constantly identified as a major culprit in the so-called "ossification" of the administrative process.[9]

To some degree, political accountability has been reimagined in a model that might be called "presidential administration."[10] Increased executive oversight over the federal bureaucracy through enhanced powers in the Office of Management and Budget was beginning as Stewart published *Reformation,* and presidentialism has since been reinforced judicially, both by *Chadha's*[11]

---

obvious and dramatic. *Compare* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) with Alexander v. Sandoval, 532 U.S. 275 (2001) (implied rights of action). *Compare* Maine v. Thiboutot, 448 U.S. 1 (1980) *with* Gonzaga Univ. v. John Doe, 536 U.S. 273 (2002) (beneficiary enforcement pursuant to 42 U.S.C. §1983).

[8] *See, e.g.,* Jim Rossi, *Participation Run Amok: The Costs of Mass Paricipation for Deliberative Agency Decisionmaking*, 92 NW.U. L. REV. 173 (1997).

[9] *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Jerry L. Mashaw and David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300 (1988). Some studies have found that agencies are generally able to achieve their regulatory goals notwithstanding occasional judicial interference with their rulemaking processes. William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere With Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000). And some have questioned whether the output of rules has declined. *See*, Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. Ill. L. Rev. 1111 (2002), but these findings raise questions about whether the regulatory success claimed is at the expense of transparency, participation and effective legal oversight, *see, e.g.*, Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405 (1996); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381; and Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, REGULATION, July/August 1981, at 25, and whether the measurements of efficacy and rulemaking activity are appropriately attentive to both qualitative and quantitative issues. *See* Jerry L. Mashaw, *Law and Engineering: In Search of the Law Science Problem*, 66 LAW & CONTEMP. PROB. 135 (2003) (arguing that NHTSA's activities over the past decade have involved largely abandoning its original safety mandate) and Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games and Accountability*, 57 LAW & CONTEMP. PROB. 185 (1994) (demonstrating that simply counting rules or pages in the Federal Register provides an incomplete and misleading view of the level of agency rulemaking activity).

[10] *See generally* Elana Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[11] INS v. Chadha, 462 U.S. 919 (1983).

invalidation of the legislative veto and by *Chevron's*[12] acceptance of implicit delegation of policymaking to administrative agencies that are subject, within the broad constraints of statutory authority, to presidential direction. To some degree, the recognition that presidents are elected by the people and are heads of administrations refurbishes the transmission belt, but attaches it to a more complex governmental machine.[13]

But presidentialism does not exclude, or even suppress, the demand for conformity to legislation. It sets the stage, instead, for a political power struggle between the executive and legislative branches for the hearts and minds of administrators. And because administrators clearly are beholden to two political principals, we cannot be certain that they are really accountable to either. "The President told me to do it" is simultaneously practically authoritative and legally irrelevant. That Ronald Reagan campaigned on regulatory relief for the automobile industry was as legally impotent in *State Farm*[14] as Bill Clinton's Rose Garden "authorization" of the FDA's regulation of tobacco in *Brown and Williamson*.[15] "Presidentialism" may have more descriptive than normative significance. And to the extent that presidents attempt to shift policy direction without a legislative mandate, their political direction can easily be viewed as undermining, rather than reinforcing, legal accountability.[16] Moreover, because presidential and congressional controls have in the past several decades relied importantly on analytic requirements audited by the Office of Management and Budget, these new forms of political accountability reinforce the torpidity of the administrative process ushered in by interest representation.[17]

---

[12] Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984).

[13] Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

[14] Motor Vehicle Mfrs' Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983).

[15] FDA v. Brown and Williamson Tobacco Corp., 529 U.S. 120 (2000); Remarks Announcing the Final Rule to Protect Youth From Tobacco, 2 PUB. PAPERS 1332 (Aug. 23, 1996).

[16] For a thoughtful assessment *see* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997).

[17] For the multiple steps that must be followed now to develop and promulgate legislative rules, see Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533 (2000).

The intellectual critique of the legal accountability mechanisms that Stewart rehearsed in *Reformation* has broadened and deepened in the thirty years since that article was published. For the critique of administrative law now takes place within a broader intellectual challenge to state-based liberal legality. Positions that were novel in 1975 have become virtually the default position for discussion of the legitimacy of public action.

That critique goes something like this: Public law – that is, administrative and constitutional law – mostly regulates regulators. It establishes the institutions and processes of governance and mediates between the claims of the state as a public collective and the claims of those individuals and private collectivities subject to state power. In liberal states, those in which individuals are seen as the basic unit of social and political value, the exercise of state power is conditional on respect for individual autonomy or moral agency. It must, therefore, be made accountable to those it governs. State power that lacks this liberal pedigree, state coercion without consent, or state action that undermines the necessary conditions for the maintenance of citizen autonomy, and with it the capacity for authentic consent, is illegitimate. It is the job of public law in liberal states to prevent or redress these illegitimate exercises of state power.

Put in terms of contemporary agency theory, in liberal states the people are the principals and government officials are their agents. Public law polices the principal-agent relationship and seeks to assure the accountability of agents to principals through myriad structural, procedural, substantive and remedial devices targeted at the standard state practices for the creation and implementation of state policies: legislation (or voting), administration and adjudication. The generic accountability devices that map onto these traditional state processes include: (1) periodic elections under conditions of open access to offices and majority rule and the political accountability of administrators to duly elected political officials; (2) hierarchical accountability within administrative bureaus; and (3) transparent and impersonal application of general norms using fair adjudicatory procedures.

Alas, few believe that these approaches do more than put loose boundary conditions around the exercise of official discretion.[18] The relationship between citizens' votes (perhaps even legislators' votes) and the output of the legislative process is notoriously weak. Bureaucrats defect from and subvert political accountability systems designed to regulate their conduct. Bureau administrators act on the basis of vague mandates and are, at best, subject to episodic oversight by political principals who often lack the relevant information necessary to

[18] For a general discussion of the challenge to liberal legality raised by critical theory and positive theory, see JERRY L. MASHAW ET. AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 37-58 (5th ed. 2003), JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 1-49 (1997), and authorities cited therein.

monitor administrative performance effectively. Courts are bound by the law, but giving meaning to the law's commands outruns any cogent articulation of a necessary relationship between general legal norms and the outcome of particular cases.

Critiques of liberal legality's claims to legitimacy, premised on the ineffectiveness of voting, hierarchical political control and reason-giving to ensure real accountability, are ubiquitous. Depending upon the critic's disciplinary and political perspective, liberal legal processes are described as a mystification that provides symbolic comfort to the uninformed, a cover for interest group diversion of public resources to private ends, or an instrument of class, racial or gender oppression. On these accounts, accountability as control has failed and with it the liberal project of moral autonomy within a framework of collective action.

Although liberalism's critics often overstate their case, they rightly give rise to anxiety about the feasibility of the accountability project upon which so much of liberal legality depends. Control of government through hard law – "rights" to the franchise, institutional checks and balances, procedural regularity, and compulsory judicial jurisdiction – is surely incomplete. Hence it is not too surprising to find that these relatively familiar critiques of liberal legality's accountability narratives have been joined by a distinctive and relatively recent strain of "soft law" partisans, who find the "hard law" control story both myopic and dysfunctional. Myopic because accountability as control through hard law techniques misses much of the action.[19] Dysfunctional because "hard law" approaches both fail to implement more responsive and effective techniques for assuring accountability, and also may stifle soft law processes that can only flourish if shielded from the threat of hard law incursions.[20]

What I am calling the "soft law" critique is made up of diverse strands of both empirical and normative commentary. For some, an understanding of the effective processes of accountability in governance requires "decentering the state"[21] so that the foreground of our picture of governance institutions can accommodate the diverse modalities of norm creation and application that go on

---

[19] *E.g.*, GUNTER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Anne Bankowska & Ruth Adler trans; Zenon Bankowski ed., 1993); Colin Scott, *Analyzing Regulatory Space: Fragmented Resources and Institutional Design*, 2001 PUB. LAW 329.

[20] Classic statements are in PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978) and Gunter Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239 (1983).

[21] *See* Julia Black, *Decentring Regulation: The Role of Regulation and Self-Regulation in a "Post-Regulatory" World*,54 Current Legal Probs. 103 (2001).

outside the purview of formal state institutions. Others urge on normative grounds that we abandon accountability through hierarchical control as inherently inconsistent with forms of responsive law that we would find both more effective and more satisfying.[22]

These ideas are sometimes suggested as reforms within existing bureaucratic processes[23] and sometimes as alternatives.[24] They march under varying trade names as scholars search for simple images that will capture their complex visions of how public law processes are being or could be transformed. But for now we might group these ideas as visions of *accountability as responsiveness*, encompassing within that notion both process responsiveness (processes that are discursive, interactive, open and participatory) and outcome responsiveness (decision outcomes that are contextual, spontaneous, experimental and revisable).

A multi-decade-long critique of command and control regulation in the United States, for example, has focused on the inefficiency of regulatory requirements. In some cases, the call has been for deregulation and a return to the market. In others, it has featured the insinuation of market-like devices into regulatory systems.[25] Critics of rule-bound public law regimes also suggest movement toward regimes that emphasize negotiation, trust, and the development of common normative understandings.[26] Whether in the development of environmental regulations or the treatment of drug offenders, reformers suggest that better, more effective, and more acceptable results can be effected by developing communities of interest that rely on techniques of social accountability to promote appropriate conduct.

---

[22] *See, e.g.*, Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

[23] *See, e.g.*, IAN AYRES AND JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

[24] *See, e.g.*, JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002).

[25] For a recent survey of a number of these ideas, see MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE (John D. Donahue & Joseph S. Nye, Jr., eds., 2002).

[26] *See* generally JAMES BOHMAN & WILLIAM REHG, DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (1997). For an extended application of these ideas in the context of a regulation of cyberspace, see A. Michael Froomkin, *Habermas@Discourse.Net: Toward A Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003). *See also*, Jody Freeman & Laura Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000).

As described, these softer law approaches need not be strongly competitive with standard public law accountability ideas. They could merely be a means of reform and reinforcement. Indeed, to the extent that soft law regimes already inhabit the interstices of hard law, recognition of their role and their contribution to accountability – exemplified by the reemerging norms literature[27] – could form an important part of the accountability project implicit in public law liberal legality.

But this optimistic view of careful institutional design to integrate responsive law into conventional public accountability regimes may describe a world that is not wholly available to us. Demands for hard law accountability are difficult to suppress.[28] And, authoritative resolution through hard law processes may stamp out interactive problem solving, stifle experimentation and stymie recursiveness. Being called to account by judges wielding legal rules[29] or by political controllers with urgent political demands (expressed through the inevitably clumsy vocabulary of legislative command or removal from office), can both delegitimate soft law accommodations and demoralize further efforts at responsible stewardship. Yet to abandon hard law controls in favor of soft law accommodations leads to precisely the conundra that Stewart saw in relation to the interest representation model – a fragmentation of authority that can as easily be described as the hijacking of public power by narrow interests as the legitimation of public authority through pluralist, participatory democracy.

While intellectual and political critique has continued to plague standard forms of public law administration, those standard forms have been losing ground in practice as well. At about the time *Reformation* was published, the political tide began to run strongly against "big government" in the Anglo-American world. Informed by intellectual commentary and concrete experience, both governing elites and ordinary citizens began to feel that modern "welfare" and "regulatory" states had over promised and underperformed. "Privatization", "deregulation", "contracting out" and "devolution" became the watchwords of governmental

---

[27] *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991), which is perhaps the founding document in the contemporary norms discourse.

[28] *See, e.g.*, the criticisms of regulatory negotiations as subverting both legal accountability and the public interest in William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and a Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1997).

[29] On the potential effects of judicial review on regulatory negotiation, *see* Philip J. Harter, *First Judicial Review of RegNeg A Disappointment*, ADMIN. & REG. L. NEWS, Fall, 1996. For an extended argument that the aspirations of the restorative justice movement and the preservation of something approximating legal accountability and the rule of law are incompatible, *see* DECLAN ROCHE, ACCOUNTABILITY IN RESTORATIVE JUSTICE (2003).

reform, and a "new public management" was created to try to align the theory of what had been "public administration" with the realities of governments who sought, in the now-fashionable image, "to steer rather than row."[30]

In many cases in the United States contracting out administration to states, localities, non-profits or for-profit firms is an undertheorized response to necessity. Most government departments and agencies at the national level in the United States have operated under some version of a hiring freeze, punctuated by substantial force reductions, for the past thirty years. There were approximately one-third fewer federal civilian employees in relation to the total U.S. workforce at the end of the Clinton administration than at the end of the Eisenhower Administration.[31] Yet over that period, the responsibilities of the federal government grew spectacularly. Technological advance helps, but governance remains a labor intensive enterprise. The only way to truly do more with less has been to borrow someone else's employees. Analysts estimate that for every federal civilian employee there are eight private, non-profit, state or local employees carrying out federal policies under varying forms of contractual, quasi-contractual or "mandate" arrangements.[32]

This situation is reminiscent of the way the fledgling United States fielded a navy both in its revolutionary struggle and the War of 1812. Unable to pay for a regular navy, it licensed privateers to work on commission. Everyone understood that regulation of these adventurers to promote the goals of the war, and to police the thin line between privateering and piracy, was a virtual impossibility. But necessity is often the mother of invention, however illegitimate the offspring.[33]

---

[30] There are many descriptions of this broad phenomenon. A particularly acute treatment of the intellectual history behind cross-national reform efforts can be found in the introductory essay in JONATHAN BOSTON, ET AL., PUBLIC MANAGEMENT: THE NEW ZEALAND MODEL (1996). For other descriptions *see, e.g.*, THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon ed., 2002) and JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS (1989).

[31] Indeed, the absolute number of federal civilian employees dropped a whopping 6.7% between 1990 and 1995. These percentages and ratios are calculated from U.S. DEP'T. OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 (1976) and U.S. DEP'T. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (2001 ed.).

[32] PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT (1999).

[33] C.S. FORESTER, THE AGE OF FIGHTING SAIL: THE STORY OF THE NAVAL WAR OF 1812 (1956) provides a general naval history. The role of privateers in particular is described in JOHN A. MCMANEMIM, PRIVATEERS OF THE WAR OF 1812 (1992) and in J. FRANKLIN JAMESON, PRIVATEERING AND PIRACY IN THE COLONIAL PERIOD (1923).

And as with the privateers of old, our emerging "contracted-out," sometimes called "hollow," state has produced new anxieties of accountability.[34] To some degree, that anxiety is a sort of equal and opposite ideological response to the phenomenon itself. The displacement of public law accountability regimes by markets disappoints those who trust government action more than market outcomes.[35] And, because contracting out is also sometimes contracting for a particular operational ethos, for example, the culture of a profession, or of a non-profit organization, or of a religious group, concerns about whether that contractor's internal norms are appropriate rise quickly to the forefront of debates. Government contracting with religious groups has been a recent sore spot in the United States,[36] but the problem is much more widespread. Many would also question, for example, whether the culture of the Martin-Marietta Corporation is appropriate to the provision of back to work services for welfare recipients. And increased reliance on self-regulation faces the challenge of "Enron," a term that once described a company, but now serves as a placeholder for concerns about endemic conflicts of interest within self-regulatory organizations ranging from the accounting profession to the Catholic Church.

---

[34] One way of putting this problem is to argue that administrative law must either develop means to hold contracted out private power accountable or risk irrelevance. This is the tenor of the essays collected in THE PROVINCE OF ADMINISTRATIVE LAW (Michael Taggart ed., 1987). Recognition of these issues both generally and in particular domains has generated a huge outpouring of legal and public administration scholarship over the last decade and a half. For a sampling, *see, e.g.*, Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507 (2001); William F. Pedersen, *Contracting With the Regulated for Better Regulation*, 53 ADMIN. L. REV. 1067 (2001); Matthew Diller *The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Mark Seidenfeld, *An Apology for Administrative Law in the Contracting State*, 28 FLA. ST. U. L. REV. 215 (2000); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986); Ronald C. Moe & Robert S. Gilmour, *Rediscovering Principles of Public Administration: The Neglected Foundations of Public Law*, 55 PUB. ADMIN. REV. 135 (1995); Paul E. Peterson, *Devolution's Price*, 14 YALE L. & POL'Y REV. 111 (1996); Ronald A. Cass, *Privatization: Politics, Law & Theory*, 71 MARQ. L. REV. 449 (1988).

[35] For a description of why "liberals" should be worried about privatization and contracting out *see*, Mark H. Moore, *Introduction, Symposium: Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003).

[36] For a defense of the so-called "faith-based initiatives" of the George W. Bush Administration, in particular the addition of "charitable choice" provisions to several statutes allowing contracting for services with religious groups, see John J. DiIulio, Jr., *Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271 (2003).

The stakes for administrative law in these contemporary controversies are substantial. If our conception of administrative accountability is limited to the standard problem of devising effective political and legal controls over the exercise of official discretion, it has no application to privatized or contracted-out governance. The retreat from regulation and the progressive extrusion of public functions onto private (or non-national) actors threatens to make administrative law irrelevant.

Many see the threat of irrelevance coming from another direction as well. While the proponents of deregulation, government by proxy, and decentralized, responsive regulation focus on the limitations of administrative policymaking and implementation in the face of complex and rapidly changing social and economic forces, others question the competence of state administration of all sorts in a "globalized" political and economic environment. From this perspective, state-based administrative systems have decreasing capacity to address transnational problems and to regulate multi-national actors. In the absence of the development of authoritative and democratic global institutions, some predict that transnational public policies will emerge from transnational networks of state administrators, multi-national corporations, and non-governmental organizations.[37] Others see the emergence of relatively strong cross-national bureaucratic institutions, at least in places like the European Union, and the increasing power and importance of the World Trade Organization.[38]

But, on either view of globalized collective action, the accountability project of administrative law seems threatened. The social network view seems to imagine norm creation divorced from electoral politics at either the state or the international levels. And complaints about the "democratic deficit" in either the EU or the WTO context are so ubiquitous they have become banal.[39] Free standing transnational bureaucracy does not seem to be the answer to the legitimacy problem that has always haunted administrative law.

---

[37] *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004). *See also* Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255 (2005) (reviewing the Slaughter book and raising issues concerning the normative acceptability of the vision that Slaughter provides).

[38] *See, e.g.*, Alec Stone Sweet & Wayne Sandholtz, *Integration, Supranational Governance, and the Institutionalization of the European Polity*, *in* EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE 1 (Alec Stone Sweet & Wayne Sandholtz eds., 1998).

[39] *See, e.g.*, Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 336-45 (2004); Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 EUR. L.J. 5, 5-7, 14-27 (1998).

Accountability and the Task of Administrative Law

Toward the end of *Reformation*, Richard Stewart posited several alternative futures for administrative law. One was the emergence of a unifying theory that would provide a foundation for evaluating the legitimacy of administrative action across the whole range of state activities. Another was a fragmentation of the field into particularistic domains, each with its own modes of action and norms of legitimation. The third involved remaining in what he then viewed as a transitional phase, but with no clear understanding of the direction in which the enterprise was headed. One might imagine these as the heaven of unified understanding, the hell of fragmentation and collapse, and the purgatory that he characterized as the "intellectual and social burdens of a dense complexity."[40]

Writing at nearly the same time, James O. Freedman saw the field as trapped in Stewart's purgatory. Freedman agreed that administrative legitimacy was to be "tested … by the degree to which administrative institutions meet the nation's highest aspirations for justice and effective government."[41] But he described the history of administrative law as a continuous struggle in which moments of apparent satisfaction were destined to be replaced by new concerns and crises of confidence that reflected a deep and continuous unease.

If we listen to the critiques of administrative performance and to the critics of the efficacy of administrative law, it is not difficult to discern the source of that persistent unease. First, our aspirations for governance are multiple and conflicting. Freedman's "justice" and "effective government" are hardly non-competitive, as the due process jurisprudence from *Martin v. Hunter's Lessee*[42] to *Hamdi v. Rumsfeld*[43] amply attests. Stewart's implicit location of legitimacy in the critical interface between democratic will and administrative rationality reveals a similar tension. Because our demands for "democratic" governance range across diverse (and often unspecified) desires for representative, plebiscitary, deliberative, and participatory democracy, no particular linkage of administration and politics is ever wholly satisfactory. Add to that America's peculiar, contested, but durable, vision of separation of powers, and every institutional arrangement for administrative governance and its legal control is guaranteed to be deficient from the perspective of some recognizable and independently sensible understanding of democratic legitimacy.

---

[40] *Supra*, note 6.

[41] JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT, 261-62 (1978).

[42] 14 U.S. 304 (1816).

[43] 124 S. Ct. 2633 (2004).

Second, in modern administrative states, administrators are the people who, in Karl Llewellyn's trenchant phrase, "have the doing in charge."[44] Administration is where policy becomes coercion, where national collective aspirations confront individual freedom and local or group identity. It is hardly surprising, therefore, that administration is often viewed as a poor substitute for the "freedom" of the market or the solidaristic values inherent in the social organization of collective activity. "Privatizers" and "soft law" partisans may often be acting out particular ideological or interest group agendas. But their critiques resonate with deeply-considered philosophic positions. Railing at "bureaucracy" is both an unreasoned reflex and an instance of a widely shared sense that administrative institutions have, as in Jürgen Habermas' analysis, so permeated and compartmentalized our lives that they threaten to extinguish authentic self-governance.[45] That many of these institutions are private fuels our demand for public oversight and regulation. That the regulators are public administrators renews our anxiety about their legitimacy and re-energizes both critique and the search for non-state alternatives.

These reflections are reminiscent of Gunther Teubner's[46] suggestion that virtually all law and all political institutions face a trilemma of demands for efficacy, responsiveness, and coherence. Put in slightly expanded terms, citizens want administrative action, indeed all public action, to be functionally successful in managing or solving social and economic problems, responsive to the will of the people, and faithful to basic normative commitments that make up the society's vision of adherence to the rule of law. But in Teubner's view, and I believe him persuasive on this, almost any reinforcement of an institution's capacity to satisfy one of these demands will have deleterious effects on its capacity to satisfy at least one of the others. To take a mundane but familiar American example, if we want the Federal Reserve Board to be effective in its

---

[44] KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 12 (1960 ed., 3d prtg. 1969)

[45] For concise introductions to Habermas' thought *see, e.g.,* ARIE BRAND, THE FORCE OF REASON: AN INTRODUCTION TO HABERMAS' THEORY OF COMMUNICATIVE ACTION (1990); DAVID INGRAM, HABERMAS AND THE DIALECTIC OF REASON (1987); and STEPHEN K. WHITE, THE RECENT WORK OF JÜRGEN HABERMAS: REASON, JUSTICE AND MODERNITY (1988). For my own reflections on the "authenticity deficit" of administrative law, see Jerry L. Mashaw, *"Small Things Like Reasons are Put in a Jar": Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17 (2001).

[46] Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions, in* JURIDIFICTION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST, AND SOCIAL WELFARE LAW (Gunther Teubner ed., 1987).

task of economic stabilization, we must drastically curtail its political responsiveness and all but eliminate its accountability to standard forms of legal control.

Viewed from this perspective, the task of administrative law in structuring and controlling administrative institutions is the task of managing tensions among these competing demands. The choices are not always as stark as those presented by the Federal Reserve Board, but the trade-offs are ubiquitous. Hence, from one or another perspective, every institution will fail, or be seen as partially failing, when called to account for its success in accomplishing its mission, its responsiveness to citizens' preferences, or its satisfaction of some vision of governance according to law.

This picture of administrative law as a perpetually unsatisfactory project of institutional design has a certain fatalistic hue. But fatalism is not the only response to perpetual dissatisfaction. Dissatisfaction spurs the desire for reform, and American administrative lawyers are, if anything, reformers. The question is how to make some progress in managing the multiple and conflicting demands placed on administrative institutions and administrative law.

When mired in a "dense complexity" one way to cope is to try to give that apt but vague notion some structure. What exactly makes our situation densely complex? Perhaps if we can describe our situation with greater clarity we can give ourselves some better tools for working our way forward.

There are many ways of going about that project. Indeed, the preceding pages have articulated some of the dimensions and components of the complex demands placed on administrative law and administrative institutions. But a better articulation of the grounds for our anxiety about the legitimacy of administrative action only gets us so far. We know that the task of administrative law is to attempt to assure that administrative institutions are accountable to the will of the governed. And it is pretty clearly the case that "the people" want administration that is not just technically legal, but also effective, responsive, and respectful of individual autonomy and group identity. Finally, it is equally obvious that these are cross-cutting demands and that any institutional design must work with imperfect alternatives – modes of action that never fully satisfy their own ideals and that often imperil competitive values. That is our situation; what then?

Elsewhere in this symposium, Sidney Shapiro[47] argues that the best that we can hope for is some form of pragmatic adjustment. There is no foundational theory or overarching "model" of administrative law or administrative institution

[47] SIDNEY A. SHAPIRO, PRAGMATIC ADMINISTRATIVE LAW (Wake Forest Univ. Legal Studies Paper No. 05-02, 2005), *at* http://ssrn.com/abstract=653784.

that will satisfy all of our demands. I feel certain that he is correct. But how are we pragmatists to go about our work?

As a start, I will spend the remainder of this essay attempting to clarify what I take to be the accountability project of which administrative law is a part. In some ways, this attempt at clarifying the idea of accountability may seem to make things worse, for my discussion broadens the institutional design conversation much beyond the conventional administrative law concerns of structuring external participation in administrative decision processes and specifying the scope and modalities of judicial review. On the other hand, by unpacking the undertheorized concept of accountability, I think we might make some progress in two directions.

First, this exercise will give us a different perspective on the routine concerns about "unaccountable bureaucrats." For, I will argue that that charge is always false. Much more must be said before anything like a sensible or useful criticism of any particular institutional arrangement has been made. Second, by examining the wide variety of techniques through which administrators – or indeed anyone – can be made accountable, we begin to see the tool kit available to administrative lawyers as institutional designers. With that tool kit in view, it is much easer to argue meaningfully about what sort of accountability is wanted and why.

My argument at its core is that once we unpack accountability, and understand the repertoire of accountability regimes through which accountability can be operationalized, we can better understand both the task of administrative law and its almost perpetual state of crisis and criticism. For virtually all criticisms of administrative systems are implicit, sometimes explicit, calls for some different accountability regime. Yet, notwithstanding irreducibly divergent viewpoints, there is a hidden unity within accountability discourse. As we shall see, every accountability regime provides an answer to six connected questions. If the task of administrative law is to structure administrative implementation in ways that satisfy legitimate demands for accountability, we need a more nuanced view of what those six questions might be about . This is not a sufficient condition for the success of administrative law's central project, but it seems a necessary one.

Unpacking Accountability

Accountability is a protean concept, a placeholder for multiple contemporary anxieties.[48] Worried about the arrogance and inefficiency of

[48] In his recent book-length study, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES (2003), Richard Mulgan puts the matter this way:

> The term "accountability" has leapt to prominence in the last two decades, becoming identified

government bureaucrats? The problem, as Richard Stewart stated in *Reformation*, is that unelected bureaucrats are not formally politically accountable. Nervous about globalization and the emerging powers of supranational organizations like the World Trade Organization, the European Union, the International Monetary Fund or the World Bank? The cause of this unease is probably the perception that such bodies are outside domestic processes of political accountability, yet weakly policed by a still patchy international political and legal order. Shocked by contracting out and government by proxy, that private contractors are running prisons, dispensing welfare benefits and planning defense strategies? That alarm is almost certainly traceable to the suspicion that placing these activities in private hands allows them to escape the political and legal accountability processes that normally surround exercises of domestic public power.

The millions of words spilled on the subject of accountability are often confusing for a quite simple reason: authors are talking about different methods and questions of accountability without specifying with any precision either the particular accountability problem that engages their attention or the choices that they are making implicitly among differing accountability regimes. The challenge is to devise a general approach to analyzing instances of accountability that will allow us to see and discuss common problems across multiple domains.

Start with a dictionary definition: "Liable to be called to account; answerable."[49] So far so good, but this definition is pretty vague. Accountability seems to be a relational concept, but the parties to the relationship remain unspecified. Some sort of account is to be given by someone to someone else, but what is the subject matter of this accounting? And, how is an account to be given? How are its facts and reasons developed, conveyed, and tested? What are the criteria or standards by which the acceptability of conduct is to be judged? Finally, someone is supposed to be "liable" or answerable for consequences, but liable for what and to what extent? Unless we know the answers to these

---

> with one of the core values of democratic governance in the English speaking world. However, unlike other core democratic values, such as freedom, justice and equality, accountability has not yet had time to accumulate a substantial tradition of academic analysis. Many authors have been writing about accountability in a variety of contexts, political, legal and commercial, but there has been little agreement, or even common ground of disagreement, over the general nature of accountability or its various mechanisms.

Id. at ix.

[49] This particular formulation is from WEBSTER'S NEW COLLEGIATE DICTIONARY (1959). There are many variations, and most lexographers reflect the multiple usages of "accountable" by noting that it is sometimes synonymous with "responsible," "answerable," or "liable."

questions we do not know much about what accountability means in any particular domain or instance.

On the other hand, by simply unpacking this vagueness we can begin to make some progress. For what our concerns tell us is something like this – in any accountability relationship we should be able to specify the answers to six important questions : *Who* is liable or accountable *to whom*; *what* they are liable to be called to account for; *through what processes* accountability is to be assured; *by what standards* the putatively accountable behavior is to be judged; and, what the potential *effects* are of finding that those standards have been breached. These basic features, *who*, *to whom*, *about what*, *through what processes*, *by what standards* and *with what effects*, describe what I will call an "accountability regime."[50] These six inquiries allow us to give an account of accountability. With the answers to these questions in hand, we can not only evaluate the potential capacity of any particular regime to satisfy our demands or aspirations, but also compare it to other regimes, evaluate their differential capacities, and perhaps articulate hybrid regimes that approximate optimal institutional designs.

A. Accountability Regimes: A Partial Taxonomy

We all feel ourselves accountable in one way or another to scores of other people and institutions. Our families, our friends, our colleagues, our employers, our bankers, our sports club, our church, our neighbors, the Internal Revenue Service, and the Motor Vehicle Department, all make demands upon us that we view as, in one way or another, legitimate. For certain aspects of our actions in certain ways and with certain effects, all of these people, groups and institutions, call us to account. The ubiquity of accountability regimes, and our entanglement in scores if not hundreds of them simultaneously, complicates the task of sorting regimes by family, genus and species. It also explains much of the apparent incoherence of claims about accountability gaps, deficits or lapses. The same action implicates numerous accountability relationships. It may, therefore, be perfectly acceptable from the perspective of some of them, while deficient from

[50] MULGAN, *supra* note 48, at 22-30, is the only other analyst that I have discovered who has attempted to provide a description of the dimensions of accountability. Mulgan's dimensions include who, to whom, for what, and how. The last category seems to include some variant of my suggested distinctions among processes, standards, and effects. In Mulgan's account, these ideas are stages of a process of accountability that include reporting and investigation (information), justification and critical debate (discussion), and the imposition of remedies and sanctions (rectification).

the perspectives of others. We need some way to group accountability regimes in order to better see their similarities, differences and interconnections.

To simplify matters I will borrow an old idea (traceable at least to Hegel)[51] that Claus Offe has deployed recently[52] as a means of better understanding the idea of corruption. Corruption, of course, is one of the many problems that societies seek to solve by increasing the effectiveness of accountability. But, as Offe points out, in a pre-modern society, where the three realms of community, economy, and governance, are not distinct arenas of human action, corruption is a meaningless concept. Rewarding your family or friends is not corrupt if governance, productive activity and social relations are all fused within the communal group. It is only when we moderns recognize ourselves as acting in distinctive domains, the forum, the market, and the community, that the idea of corruption emerges. For, corruption can almost always be understood as the (inappropriate) use of rules of behavior in one realm of human action that should apply only in another.

The same can be said for accountability regimes.[53] When we punish a politician for accepting a bribe, our complaint is at base that the rules applicable to the market have been improperly applied in the forum. When a corporate buyer is fired for making sweetheart deals with his brother-in-law, he is being held accountable for confusing family with workplace responsibilities. At a high level of generality, therefore, accountability regimes should be roughly of three types: those associated with public governance; those that police the marketplace; and those that inhabit the non-governmental, non-market, social realm.

As a preliminary matter we should also note that in liberal democracies, these three domains have strikingly different legal characteristics. When we act as public officials we act in a constitutional culture devoted to limited governance and elaborate ideas of official accountability. For public officials it is not hyperbolic to suggest that the basic legal principle is that everything not authorized is prohibited. As we move to the market, the law becomes much more facilitative and structural. We are responsible for playing within the rules of the game as enunciated by both public and private law. But the legal rules that structure markets are designed to promote individual initiative and to reward

[51] G.W.F. HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox trans., Oxford, 1967).

[52] Claus Offe, *Political Corruption: Conceptual and Practical Issues*, *in* BUILDING A TRUSTWORTHY STATE IN POST-SOCIALIST TRANSITION 77 (Janos Kornai & Susan Rose-Ackerman eds., 2004).

[53] Patricia Day and Rudolf Klein seem to have a similar set of categories in mind in their book, ACCOUNTABILITIES: FIVE PUBLIC SERVICES 4-29 (1987), although their interest is only in what they term "political" and "managerial" accountability in public services.

productive performance. Conduct is disciplined largely by the market itself – that is, by the needs of economic actors to maintain the loyalty of their transactional partners in the face of competition from others. In the social realm legal constraints are still weaker. Here the law facilitates and protects, but also carves out "law-free" zones of privacy and association. In the current vernacular this is an arena of norms rather than law.

As we will later develop, these generic differences in public law, private commercial law, and the law of private social relations are much in evidence within contemporary debates surrounding the wisdom of moving from publicly administered to contracted-out government and from hard law sanctions to softer law incentive systems. For now, however, we need to say something more about the various genuses and species of accountability regimes that inhabit our family level categories.

1. Public Governance

As a rough cut, think of public governance accountability regimes as using three principle devices. There are political regimes that operate through electoral processes and other forms of legitimating institutions; administrative (or "bureaucratic") regimes that operate through hierarchical control of subordinates; and legal regimes that operate through the authoritative application of law to facts, often by formal adjudication. In each of these regimes the issues of who, to whom, about what, through what processes, by what standards, and with what effects are answered rather differently.

For example, in a *legal* accountability regime, *public officials* are responsible *to individuals and firms, about* their respect or lack of respect for legal requirements or legal rights *through* processes of administrative and judicial review, *judged* in accordance with law, *resulting in* either validation or nullification of official acts (and sometimes compensation for private parties affected by official illegality). This legal regime is structured by a host of doctrines, rules, and norms that define who has "standing" to complain (*to whom*), who is a public authority subject to public law norms (*who*), what sorts of claims qualify as "legal" claims and are thus "justiciable" (*about what*), through what procedures administrative or judicial consideration can be obtained (*what process*), and the limits on the reviewing body's competence. These competence rules include limits on remedies that define the *effects*, or possible effects, of being held legally accountable.[54]

[54] Legal accountability in a state-governance regime, of course, runs in the opposite direction as well. Public officials are authorized to call private parties to account for their failure to respect public law norms of behavior and, through appropriate processes, to impose sanctions on them for their violation of the law. These two forms of legal accountability may be combined in a single

Consider by contrast a public administrative regime. There lower ranking officials are responsible to superiors about their compliance with official instructions. Once again, there are a host of rules and doctrines that structure these accountability relationships and provide the standards against which performance is measured. But the administrative regime is dramatically different from the legal regime. It is hierarchical rather than coordinate – officials (*to whom*) call other officials (*who*) to account within the same organization. The operation (*process*) of accountability is managerial rather than legal, continuous rather than episodic; and superiors have the power not merely to sanction wayward actions, but to remake them, remove errant officials, and redesign decision structures (*effects*).[55]

Political accountability regimes, the third genus of accountability regimes for public governance, are of two general types. Perhaps the most visible form of political accountability is the election. In electoral regimes, elected officials are responsible to the electorate about their choices of public policies. That responsibility is effectuated through voting, combined with other political and party processes of candidate selection, that lead to either reelection or dismissal of elected officials – and in the latter case, to the substitution of different ones, including different governing coalitions.

But many non-electoral accountability regimes are also essentially political in terms of the subject matter (*about what*) of accountability, that is, their focus on approval or disapproval of public policy choice, and in terms of the standards (*by what standards*) for judgment, that is, political acceptability. Top level bureaucrats, for example, are responsible or accountable to an elected official – a president, a governor, or a minister in parliamentary systems – for

---

proceeding, as when the National Labor Relations Board seeks to enforce an order to bargain collectively against an employer, who defends the enforcement action by claiming that the Board has ignored or misapplied the relevant law.

[55] To be sure, legal and administrative forms of accountability can be fused. So-called "structural injunctions," for example, remake administrative regimes and insert courts into administration in roles that resemble those of hierarchical superiors. But structural injunctions are reserved for those special and relatively rare instances in which the claim is not just that some official has breached a duty, but that the administrative and/or political regimes that make officials accountable have broken down. And the legitimacy concerns that surround these exercises of systemic legal authority reveal our unease about the mixing of accountability techniques that normally serve distinct purposes and operate in distinctive ways. This fusion at least temporarily breaks apart the articulation of administrative and political accountability that is a standard feature of public law accountability regimes. Law-wielding judges have assumed the supervisory role normally occupied by hierarchical supervisors or elected officials, who employ bureaucratic or political rather than legal authority. Behavior is being judged by different standards, not just by different persons and processes.

carrying out their discretionary functions in accordance with their political superiors' policies or ideological commitments. But the process of calling to account is not an election, responsibility is only mediately or indirectly to the electorate, and sanctions range from removal to simple displeasure, or perhaps ostracism from the inner councils of the ruling elite. Similarly, parliamentarians are responsible to party leaderships, administrative officials to congressional or parliamentary reviewing committees, and so on. In short, political accountability includes both standard electoral processes and a host of other political processes in which elected officials hold their fellows, or non-elected officials, accountable for their actions based on essentially political criteria.

These public governance regimes – legal, administrative and political – have been described in highly stylized ways. Within each regime our six critical variables – who, to whom, about what, through what process, by what standards, and with what effects – have their own complexities, and their articulation within any particular regime varies from issue to issue. If "public governance" is the family, and "political," "legal" and "administrative" the genuses, there are countless species. [56]

2. Accountability in the Market

Non-governmental or private activities are subject to similar structures of accountability. One is market accountability, as organized through product markets, capital markets, and labor markets. And once again this tripartite division suggests that the "who," "to whom," "about what," "through what processes," "by what standards," and, "with what effect" questions are answered differently in these different market arrangements.

In product (including service) markets, for example, producers are responsible to consumers (or other producers who use their components) for their products' quality and price. The process or mechanism of accountability is market competition – within the constraints of various public and private law frameworks that structure the rules of the competitive game. The standards are customers' individual preferences. The effects of accountability to the market are, immediately, the willingness of consumers to buy the product at the offered price, and, ultimately, a product's capacity to maintain itself in the market.

[56] Virtually every issue in the field of administrative law, for example, might be interpreted as a dispute about the appropriate boundaries and functions of political legal and bureaucratic accountability regimes. For further development of this idea, *see* Jerry L. Mashaw, Judicial Review of Administrative Action: Reflections on Balancing Political, Managerial and Legal Accountability (2004) (paper prepared for a conference on Economic and Social Regulation, Accountability and Democracy, Sao Paulo, Brazil, March 15-16, 2004).

In somewhat similar ways, financial markets make firms or managers accountable to those who provide debt or equity capital and labor markets make firms and workers reciprocally accountable to each other for the quality of the human capital available in the market and the pay, benefits, and working conditions that are provided.

As was hinted at earlier, market accountability in product, financial, or labor markets is considerably more fluid than public law accountability regimes. In product markets, for example, company charters no longer specify what firms will produce or what services they will render, as would be true of any public bureau. Consumers self-select to be the monitors of product or service quality, unlike electors who may only vote for certain representatives within certain localities or precincts. And, the process of market competition, while constrained by boundary requirements designed to eliminate force and fraud, and to limit negative externalities, permits, indeed encourages, innovation in the techniques for facilitating consumer choice. This is not the constrained world of judicial process, administrative decisionmaking or even legislative bargaining. And, the market provides its rewards or sanctions incrementally and over time. Products or services are selected for success or failure not by discrete acts of collective judgment, but by the aggregation of individual consumer choices.

The level and style of legal intervention to structure and regulate markets of all types is, of course, remarkably heterogeneous across space (polities) and time (regulatory reform is always on the agenda). And market actors always operate in a world structured by public accountability regimes. Indeed, what we normally mean by "regulation" is some system of behavioral controls that make private parties accountable to the state, as a placeholder for the general public, in ways that are difficult or impossible to accomplish through regimes of market accountability.

Yet, regimes of market accountability are sharply distinguishable from public law accountability systems. While they operate within constraints supplied by both public and private law, many of those constraints are designed largely to make the competitive process work more effectively. To that degree, they do not change the persons to whom market actors are accountable, what they are accountable for, or the effects of failing to live up to the market's expectations. Regulation leaves market accountability restructured, but intact, as a decentralized mechanism for policing the satisfactoriness of private behavior.

Indeed, public governance and market accountability are sufficiently distinct that some may object to the use of the concept of "accountability" to describe the disciplining effects of markets. In one particularly well thought-out example of this argument, Richard Mulgan advises that "it is a misuse of the concept of accountability to apply it to the responsiveness of providers to consumers generated by competitive markets. Accountability is essentially

connected with authority relations and concerns the rights of owners or principals to instruct their agents and to call them to account."[57] For Mulgan, markets are about efficiency, not accountability, and in designing institutions, we should think carefully about trading off accountability for efficiency. Calling markets a form of accountability seems to obscure this trade-off.

I do not want to argue that there are not crucial differences between systems of bureaucratic authority and systems of market behavior. But categorical classification has the vices of its virtues. Failure to imagine markets as accountability devices obscures the degree to which these systems actually blend into each other and provide alternative paths to a similar overall goal, that of promoting publicly responsible behavior.

For example, Mulgan's vision of accountability as an authority system contrasts mechanistic images of commands backed by sanctions with weaker and more amorphous forms of discipline that may or may not provide effective incentives for proper behavior. But bureaucratic authority systems are considerably less "authoritative" and more amorphous than they might seem from Mulgan's account. Superiors seldom "command" their subordinates in any straightforward way. Instead, they exert influence and negotiate for authority. Hierarchies turn out to be, not pyramids, but dense networks.[58] The trade-offs

---

[57] Richard Mulgan, *Contracting Out and Accountability*, AUSTRALIAN JOURNAL OF PUBLIC ADMINISTRATION, Dec. 1997, at 106. Mulgan is not arguing against the efficiency of markets. For, he goes on to say, "as demonstrated by the success of policies of corporatisation and privatisation, the incentives and disciplines of market competition are often more effective than the more cumbersome mechanisms of bureaucratic and political control. In such cases, however, it should be admitted that public accountability has been reduced in order to secure the benefits of market competition."

It should be noted however, that Mulgan is not entirely consistent in his own usage. For at one point he says, "Apart from direct shareholder participation in representation through directors, the other main mechanism of commercial accountability, particularly for companies listed on the stock market, is the sharemarket." MULGAN, HOLDING POWER TO ACCOUNT, *supra* note 48, at 122. Here, at least financial markets, if not product and labor markets, seem to be serving as accountability devices.

Other authors find no difficulty in treating markets as accountability mechanisms. *See, e.g.*, John D. Donahue, *Market-Based Governance and the Architecture of Accountability*, *in* MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE AND DOWNSIDE 1 (John D. Donahue & Joseph S. Nye, Jr. eds., 2002).

[58] To be sure, some "accountability" – that is, direction and control – is achieved by the threat or use of sanctions of varying severity, including the withholding of rewards. But the powerful engines of influence are either *exchange*, the giving of cooperation by mutual recognition of contribution and obligation, or *identification*, collaboration based on shared values, purposes, and outlook. For an extended treatment of these matters, see ANDREW DUNSIRE, IMPLEMENTATION IN A BUREAUCRACY (1978), and ANDREW DUNSIRE, CONTROL IN A BUREAUCRACY (1978).

that Mulgan refers to are more complex than those captured by a system-level contrast between market-based efficiency and authority-based accountability.

The analysis of institutional arrangements involves, therefore, not just recognizing that there are accountability differences between markets (and societies) and hierarchies, but also understanding exactly what those differences might be. Ultimately, markets, too, are created to serve social purposes[59] – such as cost control, innovation, productivity growth, full employment, and the like. Proponents of contracted-out or voucherized public education, for example, are not advocating trading accountability for efficiency. They are instead seeking enhanced accountability.[60] Their arguments are ultimately over questions of who should be responsible to whom, about what, through what processes, and with what effects.

3. Social Accountability

Social accountability is such a fluid concept that there is some difficulty in wrapping one's mind around it.[61] That these ideas are dynamic and complex does not, of course, mean that they do not describe real phenomena. Indeed, our accountability to others within our various social networks are often more meaningful for us than anything that we do in the forum or the market place.

I am accountable to my wife for being a good husband, but to whom else? My children, her parents, my parents, her brothers and sisters, her friends, our acquaintances, my pastor, my boss? All of these people, and perhaps others, have stakes in our relationship. Should they be able to call me to account? For what? What is the meaning of "good husband"? The possibilities are almost endless and utterly contextual, shifting perhaps almost by the minute. On what occasions and through what techniques am I to be called to account? What are the fair processes

---

[59] For an extended argument to this effect, see CHARLES E. LINDBLOM, THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS AND WHAT TO MAKE OF IT (2001).

[60] Indeed, the use of vouchers for a broad range of programs has been motivated in substantial part by the desire to provide "exit" in addition or as a substitution for "voice" accountability. For a general discussion, see Michael J. Trebilcock, et al., *Government by Voucher*, 80 B.U. L. REV. 205 (2000).

[61] The literature on accountability in personal or social relationships is rather sparse. *See, e.g.*, G.R. SEMIN AND A.S.R. MANSTEAD, THE ACCOUNTABILITY OF CONDUCT: A SOCIAL PSYCHOLOGICAL ANALYSIS (1983); PETER MARSH, ET AL., THE RULES OF DISORDER (1978); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 AM. SOC. REVIEW 46 (1968). A recent treatment from a feminist legal perspective is ANITA L. ALLEN, WHY PRIVACY ISN'T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY (2003).

of enforcing spousal responsibilities within the pair? In relation to others? With what effects over what domains of our relationship and over what time periods?

These are the questions that marriages negotiate over years and decades. The contexts for the answers are so various that we can hardly imagine giving a cogent explanation of "spousal accountability," save perhaps by giving an ironic "*cf*" citation to a fair slice of the world's literature.[62] Nevertheless, it is unarguable that "accountability" is indeed demanded in such situations. And it is plain that that particular accountability traverses the six issues that structure accountability per se.

The accountability regimes generated by social networks have a distinctive character. Social accountability regimes are a world of what we might call "community and culture" – negotiable, continuously revisable, often unspoken; oscillating between deep respect for individual choices and relentless social pressure to conform to group norms.

On the other hand, many social networks are more structured or formalized. They have non-profit, corporate charters and by-laws; they make rules and adjudicate cases. And as social networks expand and take on formal structure they tend to become more narrowly purposeful as well. Moreover, the more these private associations take on regulatory functions that operate in lieu of or coordinated with state governance,[63] the more law is likely to intrude upon them. And because many private organizations, trade and professional associations chief among them, are organized around common economic interests, many familiar groups in "civil society" have a contestable, hybrid legal character.[64]

---

[62] To be sure, there are hard legal constraints on the structure of social accountability. In western, liberal, democratic regimes, wife beating and honor killings are out. But the constraints are large and loose, and importantly so because in a liberal democratic regime, rights of private association are fundamental to human dignity and civic identity. The law's character here is thus distinctive. It serves primarily to recognize and give legal legitimacy to certain standard relationships. It polices the outer boundaries of power. It structures both the creation and the dissolution of certain forms of association. It protects domains of privacy and association against encroachment from both governmental and commercial interests**.** Yet, by contrast with the hard law structuring of market accountability regimes, legal regulation of family and other networks in civil society operates under strong constraints of respect for privacy, freedom of association, and freedom of speech and assembly that are often given constitutional status.

[63] *See generally* Colin Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance* 29 J.L. & SOC'Y 56 (2002).

[64] Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000). I am not quite certain, for example, whether to characterize the American Bar Association as a voluntary, professional association devoted to improvement in the quality of legal services, a licensing board carrying out public regulatory functions, or an economic cartel that protects its members from effective market discipline. For different purposes I may treat it as all three.

Still, the accountability regimes generated by social networks have a distinctive character. They generally apply only to members (*who*), and they usually involve reciprocal obligations among them (*to whom*). "About what," "through what process," and "by what standards" tend to be internally generated rather than externally imposed by legal rules or market structures. And rewards and sanctions, such as acceptance into or expulsion from membership or status within the group, are uniquely, but not exclusively, related to the group or network itself.

Because social networks are implicitly normative and rely importantly on voice as a mechanism for calling members to account, social accountability may not generate the same sorts of "category-mistake" objections that were noted concerning market accountability. Yet, from an institutional design perspective network accountability may seem even more problematic. Social networks are the home of cultures and subcultures. They often arise spontaneously as the contested sites of "meaning-making" and they define for their participants the boundaries between the thinkable and the unthinkable, the appropriate and the inappropriate. Culture is not necessarily malleable from the outside. Does it make any sense to talk about institutional design as involving a choice about social accountability regime, or about the comparative utility of such regimes in relation to governance or market mechanisms?

It does make sense, but the simultaneous power and fragility of social accountability systems makes institutional engineering both a delicate and a chunky enterprise. Consider bar associations for example. Federal and state governments have often sought to use them in attempts to appropriate their professional standards as a means for regulating both admission to the bar and professional conduct. But in so doing they buy into a cultural package that may have unwanted as well as desired normative characteristics. This chunkiness is difficult to address because attempting to shift culture through external sanctions almost always has unpredictable consequences. The law can make the bar more accountable to the market by prohibiting mandatory fee schedules or a ban on advertising, but it cannot easily predict whether this legal demand for market accountability is a small adjustment or will work massive changes in the internal culture of the profession. In the limit the "professionalism" that argued for self-regulation might become so attenuated by market forces that other, second-best, techniques will have to be employed.

B. Fixing Ideas

Figure 1 pulls together in tabular form much of the preceding discussion:

Figure 1 - Accountability Regimes

	Who	**To Whom**	**Standards of Appraisal**	**About What**	**Through What Processes**	**With What Effects**
State Governance • Political	elected officials administrators	citizens elected officials	ideology or political preference aggregation	policy choice	voting oversight	approval removal, funding, authority
• Administrative	public officials	superiors	instrumental rationality	implementation	Monitoring	approval, substitu action, etc.
• Legal	officials individuals or firms	affected persons state	legal rules	legality	judicial review enforcement	affirmance, reman injunction, penaltie or compensation
Private Markets • Product	firms & customers	product markets	preference aggregation	payment, price & quality	competitive contracting	profit or loss, refus to deal
• Labor	employers and human capital suppliers	labor markets	preference aggregation	remuneration & performance	competitive contracting	maintenance, severance alteration contracts
• Financial	management and capital suppliers	capital markets	preference aggregation	acceptable terms and returns	competitive contracting	acceptance, refusa provision withdrawal of capita
Social Networks* • Family	members	Each other	group norms	appropriate behavior	individual and collective appraisal	praise & blam affection, suppor etc.
• Profession	members	Each other	group norms	satisfaction of professional norms	individual and collective appraisal	esteem, statu exclusion, penaltie etc.
• Team	members	Each other	group norms	contribution to joint effort	individual and collective	comradeship, statu exclusion, etc.

* The networks here are illustrative, not exhaustive.

					appraisal	

Putting the characteristics of these accountability regimes into boxes or grids surely overstates the degree to which they are distinctive. In the real world, these "regimes" flow and blend into each other in just about every imaginable way. Nevertheless, broad differences in kind are clearly distinguishable.

For example, consider the differences between accountability regimes associated with public governance and those that inhabit private markets and social networks. In the public governance realm, there is significant role differentiation and accountability obligations tend to flow in only one direction. Elected officials owe an obligation of political accountability to citizens, for example, but not vice versa. By contrast, in markets both buyers and sellers are subject to the same market discipline, and in networks, because obligations are based on agreement or mutual alignment, they are reciprocal. In both the market and social contexts, mutual adjustment is to be expected and the accountability regime is to that degree more flexible or responsive than a state governance regime.

Similarly, in the realm of public governance the processes of holding to account tend to be formalized, structured and collective. Competitive contracting in private markets, by contrast, is decentralized, informal and individualized. The aggregation of individual actions by markets produces outcomes or effects, but not because mechanisms of collective choice are actuated to hold firms, employees, or products accountable for their market performance. And, while families, professions or teams may act collectively, the social relations among members are also defined by continuous interactions that display approval or disapproval of any member's behavior.

Similarly, insofar as public governance is concerned, the content of the relationship between the "who" and the "to whom" tends to be both hierarchical and asymmetrical. Obligations may flow up or down the hierarchy, but their content will differ depending on direction. Market and social accountability regimes tend to have a more coordinate structure, in which many obligations are mutual, and the persons to whom or from whom obligations are owed shift with context and role, not with formal office.

The "through what processes" aspect of public governance accountability regimes tends to involve stylized actions – votes, adjudications, executive orders, and notices of termination. Administrative acts operate through transparent and regularized procedures, which even outsiders can know and appeal to in seeking to trigger accountability processes. Sanctions in official accountability regimes proceed from some formally designated authority and are themselves constrained by very public norms. At the other end of the spectrum are informal acts of social sanctioning – raised eyebrows, frowns, and turning a deaf ear. To know the

"rules" by which these acts can be judged appropriate or inappropriate, one has to be within the particular culture or subculture.

Finally, insofar as standards of appraisal are concerned, public governance accountability regimes tend to present themselves as epistemically complete. Criteria for judgment are established and exposed to public view and actions are judged in accordance with those preexisting norms.[65] At the other end of the accountability spectrum lie normatively open social systems – systems that are in Robert Cover's famous denomination, "jurisgenerative" rather than "jurispathetic."[66]

Given these differences, it is hardly surprising that shifts in accountability structures generate anxieties. Whether to deliver services to welfare beneficiaries via public officials, the Maximus Corporation, or a group of local charities is not just a question of technical capacities. These organizations operate within different accountability systems or regimes. But we should not mistake what is at issue. These sorts of choices do not make actors accountable or unaccountable. Instead they institute regime changes. Whether we have gained or lost by shifting from one accountability regime to another depends upon who we want to be accountable, to whom, about what, through what processes, judged by what criteria, and with what effects.

C. The Uses of Taxonomy

1. Critique, Dysfunction, and Conflict

Let me re-emphasize that the distinctiveness of governance, market, and social accountability regimes can be oversold. These systems are, to put it mildly,

---

[65] This notion is, of course, deeply contestable. Eminent legal and social theorists view legal and social sub-systems as normatively complete. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); NIKLAS LUHMANN, SOCIAL SYSTEMS (John Bednarz, Jr., & Dirk Baecker trans., 1995). Equally eminent theorists argue that norms are almost everywhere relational, contextual, and open to negotiation. *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996); MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW (2004). We need not here plumb or attempt to plumb the depths of this controversy, for few critics of the normative-completeness claim would deny that legal, bureaucratic, and political systems tend to hold themselves out as subject to fundamental normative commitments from which the appropriate resolution of normative disputes can be discerned. Indeed, it is the basic project of post-modern critical theory to emancipate individuals from the notion that the normative structure of their world is in some way given or "natural." For a general introductory treatment, *see* RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL (1981).

[66] Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

fuzzy at the margins. Electoral voting looks a lot like a market test for political viability; and, like social institutions, administration and adjudication are norm creating, not just norm applying. Most actors operate within overlapping regimes. Firms are market actors, but managerial action within firms substitutes administrative for market accountability; and products and firms compete for customer or investor loyalty based on a host of shared social norms ranging from environmental trusteeship to promotion of the public health to support for the arts. Meanwhile, civic associations attract members with market-like offerings ranging from calendars and coffee mugs to health and casualty insurance. We operate within fluid accountability regimes that sometimes reinforce and sometimes are in tension with each other.

These regimes are not only potentially reinforcing or competitive, they also have different strengths and weaknesses. From an institutional design perspective, a perceived weakness in one regime leading to irresponsible behavior is not necessarily a signal that that form of accountability should be *strengthened*. It may be more effective to attempt to weaken the accountability constraints of a competitive regime or to amplify the effects of a potentially reinforcing one. Consider, for example, K-12 educational reform. Stringent political or bureaucratic accountability of public school teachers and principals is often viewed as the problem, to be solved by instituting market-like accountability (vouchers) or perhaps the peer accountability of like-minded professionals (contracted-out charter schools). These proposals do not reinforce ineffective, but powerful, public accountability systems; rather they jettison the public accountability systems for different accountability regimes that answer every accountability question other than "about what" (educational quality) very differently. Such choices about accountability regime will themselves inevitably raise further questions about the capacity of the new regimes to satisfy accountability demands. (Can parents really act effectively to monitor quality? Can for profit charter school managers really be constrained by contract and completion to serve public interests? And so on.) Our choices are always from among imperfect alternatives. Every exercise in devising appropriate accountability systems is thus an exercise in comparative incompetence.[67]

2. The Perplexities of Institutional Design

Think back to the earlier discussion of contemporary anxiety about administrative law and governance. To some degree, those anxieties were merely a continuation of the concerns about the incompleteness or partiality of political oversight, administrative routines, and judicial review to effectively structure and

[67] This is the basic idea of the branch of organizational theory sometimes called "contingency theory." *See, e.g.*, JAMES D. THOMPSON, ORGANIZATIONS IN ACTION: SOCIAL SCIENCE BASES OF ADMINISTRATIVE THEORY (1967) and Charles Perrow, *A Framework for the Comparative Analysis of Organizations*, 32 AM. SOC. REV. 194 (1967).

constrain administrative action. These were the concerns to which *Reformation* was addressed and that I have recharacterized as problems located in the domain of public governance accountability. By contrast, many of the post-*Reformation* critiques of the administrative state can be understood as calls for greater utilization of alternative accountability mechanisms. Demands for deregulating, contracting out, and "voucherizing" public goods and services, or for inserting regimes such as "emissions trading" into existing regulatory structures, are calls for utilizing market accountability as the preferred or partial means for implementing social policy. Similarly, calls for the devolution of decisionmaking down to the local community level, for responsive regulation through self-regulation, for "democratic experimentalism," or for the recognition of the legitimacy of transnational networks as authoritative sites of norm creation, emphasize what I have called social or social network accountability structures. The new face of debates about administrative governance can therefore be understood, in part, as a competition among partisans of different accountability regimes.

But, as we also noted, critics of marketized or devolved regulatory structure are quite right to point out that market and network accountability regimes have their own imperfections. And the accountability that they may demand to values of efficiency or social solidarity can undercut countervailing values that inhabit the complex normative world of public programs. Contracted-out or proxy governance may suppress or ignore important public values, and undermine political and administrative capacities. Free standing global bureaucracies may become rigid and self-referential. Transnational "epistemic communities" may only magnify the ideological blinkers of their component institutions and reinforce partial understandings of social welfare that would be broadened if subjected to standard pressures of pluralist political bargaining at the national level.

But the recognition of dangers is not the same as the prediction of disasters. A more nuanced idea of the accountability challenges posed by either standard techniques of public administration or novel forms of public-private or national-transnational partnerships can only be obtained by examining particular instances. And that is not a task that can even be begun in this essay.[68] But the need for particularity – or perhaps more properly, contextuality – might be grasped by imagining the banality of abstractly articulated accountability "rules of thumb."

[68] A somewhat more complete account with more extended examples appears in Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* RETHINKING PUBLIC ACCOUNTABILITY (Michael Dowdle ed., forthcoming 2005).

For the moment, consider institutional design as a straightforward, instrumentally rational, quasi-engineering process. In such a world we would specify our normative commitments, the policy goals that those normative commitments imply given current states of the world, and choose accountability regimes appropriately designed to mold behavior in the direction of our commitments.

As institutional designers in that world, we could begin by recognizing that public governance accountability regimes are meant to reinforce the normative commitments of a political system. In a liberal democratic polity, for example, we expect governance accountability to reinforce mechanisms of consent and to ensure that collective judgments (legal standards and public policies) are impersonally applied. Governance accountability is meant to reinforce democracy and the rule of law.

Market accountability, by contrast, is meant to ensure that resources are devoted to their highest valued uses. Efficiency is the norm that we want our product, financial and labor markets organized, at a minimum, to ensure efficient allocation of resources.

The normative underpinnings of social networks are quite various, but in one way or another, social networks support particular ideals of human flourishing. As social animals, we need solidarity with others in the project of developing and maintaining a culture that we recognize as our own. These cultural practices give meaning to our lives, allow us to shape our identities, and are reinforced by the sense of reciprocal obligation to the members of the group that we recognize as having claims on us.

This understanding of the normative underpinnings of public governance, market, and social network accountability systems might lead to a straightforward set of rules of thumb for institutional design. Worried about the protection of democratic values and the rule of law? Emphasize public governance accountability regimes. Interested in efficiency? Try to construct markets that are truly responsive to the demands of producers, consumers, lenders and borrowers, employers, and employees. Seeking to promote human flourishing through the authentic creation of recognition of social norms? Design institutions to leave space for the development of group norms and rely on the reciprocal obligations of group members to maintain fidelity to that particular network's normative commitments.

There is, of course, something to these rules of thumb. It would be treacherous to forget their teachings entirely. But these abstract characterizations turn out to be of limited utility once the institutional designer recognizes that each regime has downsides as well as upsides and that no program or institution really serves only one purpose or goal.

For example, American administrative lawyers weaned on cases like *Matthews v. Eldridge*,[69] and *Richardson v. Perales*,[70]and *Heckler v. Campbell*[71] are likely to view the administration of Social Security disability benefits as a straightforward bureaucratic/ adjudicative task. Medical evidence is collected by front line adjudicators and expansive opportunities are provided to denied applicants for legal contest, through both administrative hearings and judicial review. The system, thus understood, is about the protection of legal rights and the structuring of legal accountability is its primary design challenge.

But this is a vast oversimplification of both the past and the possible futures of disability benefits policy.[72] Early proposals conceived of administering the program through a local "social network approach" modeled on local draft boards. The argument was that not only was information about claimants local, but also that the judgments involved were based essentially on cultural norms – who should be expected to work and who not, given the complex interaction of medical conditions, personal circumstances, and local economic environments. But, fears of bias, particularly racial bias, made this approach problematic.

The choice instead was to delegate initial determinations to state vocational rehabilitation professionals. These specialists, imbued with common professional values of the importance of return to work, were expected to produce an efficient allocation of claimants to pensions or to back-to-work programs.[73] But this alternative approach to harnessing group culture to public purposes had a fatal flaw; it misunderstood the bureaucratic culture of state vocational rehabilitation agencies. The bureaucratic culture evaluated success on the basis of the percentage of clients a particular vocational specialist managed to return to

[69] 424 U.S. 319 (1976).

[70] 402 U.S. 389 (1971).

[71] 461 U.S. 458 (1983).

[72] Extended analysis of the disability determination process can be found in JERRY L. MASHAW, BUREAUCRATIC JUSTICE, MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) [hereinafter "BUREAUCRATIC JUSTICE"]; JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978); NATIONAL ACADEMY OF SOCIAL INSURANCE, BALANCING SECURITY AND OPPORTUNITY: THE CHALLENGE OF DISABILITY INCOME POLICY (Jerry L. Mashaw & Virginia P. Reno eds., 1996); INSTITUTE OF MEDICINE, THE DYNAMICS OF DISABILITY: MEASURING AND MONITORING DISABILITY FOR SOCIAL SECURITY PROGRAMS (Goloo S. Wunderlich et. al eds., 2002).

[73] STAFF OF HOUSE WAYS AND MEANS COMM., 93D CONG., COMMITTEE STAFF REPORT ON THE DISABILITY INSURANCE PROGRAM 111-12 (Comm. Print 1974). *See also* MARTHA DERTHICK, POLICYMAKING FOR SOCIAL SECURITY 303 (1979).

work. Because applicants for disability insurance benefits were usually quite seriously impaired, they were risky clients for service providers. The vocational rehabilitation specialists, therefore, classified most claimants as too impaired to benefit from return to work services.

When it became clear that vocational rehabilitation personnel would not provide effective brakes on program generosity, the Social Security Administration, under intense prodding from Congress, attempted to maintain fiscal responsibility through detailed rules and hierarchical controls. But the legal system's demand for adjudicatory independence trumped the administration's attempts at hierarchical control of administrative law judges, and the contracted-out nature of initial decision making to state agencies produced a political backlash of seismic proportions.[74] These events demonstrated rather clearly that disability benefits adjudication was considerably more than a technical bureaucratic exercise in accurate factfinding.

More recently, Congress has begun to experiment with "voucherizing" return-to-work services and "early intervention" projects have begun to respond to the widespread belief that the program should support, rather than hinder, contemporary "rights-" or "empowerment-" oriented visions of disability policy.[75] From this perspective, disability income supports, protected by elaborate legal accountability mechanisms, are but one of many approaches to empowering persons with disabilities to lead more rewarding lives. Vouchers make return-to-work service providers accountable to beneficiaries as consumers, and early intervention projects contemplate contracting for services from medical and rehabilitation personnel imbued with the norms of the "helping professions".

As these examples illustrate, beliefs about how administrative decisions should be made, and how they should be made accountable, are parasitic on beliefs about the purposes of programs. And because programmatic purposes are contestable, and accountability regimes have strengths and weaknesses, abstract normative specification of the goodness of one or another accountability regime verges on the useless. Even if we can agree upon purposes, our predictions about how decision structures will operate and can be made accountable are always subject to falsification by the facts of the matter.

Finally, the normative issues surrounding any accountability system are not exhausted by attention to the "fit" between normative commitments that

[74] For a description of the legal and political controversy surrounding disability insurance in the 1970s and 1980s, see Jerry L. Mashaw, *Disability Insurance in an Age of Retrenchment: The Politics of Implementing Rights, in* SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISES 151 (Theodore R. Marmor & Jerry L. Mashaw eds., 1988).

[75] These experiments are embodied in the rather awkwardly named Ticket to Work and Work Incentives Improvement Act (TTWIIA), Pub. L. No. 106 -170, 113 Stat. 1860 (1999) (codified at 42 U.S.C. §1320b-19 (2000)).

various accountability regimes might arguably support and the goals of particular programs. It may be true, for example, that in providing effective social supports, income security, and economic opportunity for disabled workers, market incentives operationalized through return-to-work service vouchers, or support and rehabilitation plans contracted out to multi-disciplinary professional groups will provide a better fit between our broad social purposes and implementing instruments. But we will immediately begin to ask ourselves: How, in these "marketized" or "contracted-out" decision systems, can we be assured that workers will be treated with equal concern and respect? Will like cases be treated alike? How we can be sure that public funds will not be wasted on ineffective, but professionally-fashionable, nostrums?

If accountability regimes emphasizing markets and networks cannot provide adequate answers to these questions, we might decide to abandon those purposes in favor of a more restrictive set of ends (income security, as in the current program) that can be made more transparently accountable to law. In so doing, we in some significant sense, turn the design enterprise on its head. We design programs that can be made accountable, not accountability regimes that support programs.

Administrative Law as Institutional Design

Nothing that I have said about sorting out the multiple meanings of accountability or the strengths and weaknesses of differing accountability regimes will cause these perplexities of institutional design to disappear. Nor do I want to deny the importance of administrative law's historic normative focus on preserving the possibilities of individual autonomy within the context of insistent demands for collective action. I do want to argue that to the extent that this project has focused mostly on procedural form and judicial review as the means for insuring political legitimacy, it is too narrow. The model of administrative law that I have begun to sketch in these pages is a model of administrative law as institutional design. Because administrative law's function is, as Kenneth Davis said many years ago, to confine, structure, and check administrative discretion,[76] institutional design from the perspective of administrative law must focus on accountability. But, if we imagine that the citizens' demands on administrative institutions include that they be effective and responsive, in addition to operating according to law, we can also recognize that the modalities of accountability stretch beyond those usually associated with public governance. The challenge is to design administrative institutions that creatively deploy multiple modalities of accountability for the pursuit of complex public purposes.

To my mind, this refocusing of the project or agenda of administrative law has several positive attributes: First, it helps us to concentrate on real issues.

[76] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 25-26, 216-19 (1969).

Bland pronouncements that one or another implementing action is "unaccountable" can be seen for what they are: the failure to start a productive conversation. Unless one is prepared to say who should be accountable to whom, about what, through what processes, judged by what standards, and with what effects, one has failed to pay the price of admission to participate in a meaningful discussion.

Second, the recognition of something like a "law of conservation of accountability" reinforces serious attention to the details of institutional design. Every loss of accountability in one direction is likely to entail the reinforcement of accountability in another. The real questions have to do with what accountability regime is wanted in particular contexts and why. Moreover, the conversation does not stop there. That we self-consciously want to reduce political and legal accountability of the Federal Reserve Board for monetary policy, to take a prior example, does not exhaust our interest in structuring Federal Reserve Board accountability. Reducing political and legal controls will almost certainly amplify the force of market incentives and social network constraints. We may also, therefore, want to reduce the accountability of the Board to any particular segment of the market. And we may want to reinforce certain aspects of the Board's accountability to public opinion or to peer review by the Board's professional networks within the economics and financial communities. Carrying out these desires would, of course, be done through administrative law – legal specification of the Board's structure, processes, membership qualifications and required or prohibited consultative relationships.

Finally, the image of administrative law as the project of designing governance institutions that are appropriately accountable for their efficacy, responsiveness, and legality, creates a positive agenda that helps to side-step increasingly arid disputes about the virtues and vices of government, the market, and civil society. Virtually all of our institutions are intractably hybrid. The important questions demand that we confront the question of what combinations of governmental, economic, and social instruments will move us forward in achieving competent, responsive, and lawful collective action. When pursuing this positive agenda, we may even find that the problematic institutions that are *Reformation's* central focus, unaccountable bureaucracies, with their strong forms of internal accountability, are almost always part of the solution, not just the problem.

In *Reformation* Stewart mentions, but immediately rejects,[77] the so-called "expertise" model of administrative legitimacy, often associated with Progressive and New Deal partisans such as James M. Landis.[78] After all how could

[77] *Reformation* at 1677-78.

[78] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

"professionalism" respond to the accountability demands of a transmission belt image of political legitimacy? And in our own time "expertise" tends to be viewed as a mere cover for the elitist hegemony or self-interested machinations that are staples of critical and public choice accounts of bureaucratic governance.

Yet, if there is one key objection to *Reformation's* analysis, I believe it is that article's tendency to take the transmission belt metaphor too seriously – to assume that administrative accountability and administrative legitimacy must flow from or be oriented toward a single source of political authority rooted in electoral processes. As this essay's unpacking of accountability mechanisms has sought to reveal, administrative governance is almost always constrained by multiple forms of control or oversight. Some ultimate connection to electoral democracy may be a necessary condition for legitimacy, but direct connections seldom exist and often are not wanted. Our representative democracy, with separated and divided powers, has always problematized the ultimate locus of political authority and allowed "the people" to speak through multiple institutions.[79]

From this broader perspective on administrative accountability administrative authority can be self-limiting as well as self-aggrandizing. The early students of American administrative law viewed internal agency structures and practices as far more meaningful in assuring action according to law than the external constraints of judicial review.[80] And professionalism in administration was understood by Landis and others[81] to include commitment to shared public values, not just to the instrumentally rational techniques of a particular discipline. This internal law of administration, as I have argued elsewhere,[82] can be reinforced by broader forms of Executive oversight that seek to enhance synoptic rationality and avoid bureaucratic tunnel vision. And, at its best, administrative decision making draws normative support from ideas of deliberative democracy[83] that have always competed in the American context with electoral or

[79] This view has been held by many, but is now often associated with my colleague Bruce Ackerman. *See*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); WE THE PEOPLE: TRANSFORMATIONS (1998).

[80] *See, e.g.*, FRANK GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES (1905); and Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403 (1894).

[81] This was particularly true of Canada's most famous "new dealer" John Willis. *See, e.g.*, John Willis, *The Mcruer Report: Lawyers' Values and Civil Servants' Values*, 18 U. TORONTO L. J. 351 (1968). *See* also, John Willis, *Canadian Administrative Law in Retrospect*, 24 U. TORONTO L.J. 225 (1974).

[82] BUREAUCRATIC JUSTICE, *supra* note 72.

[83] *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

"plebiscitary" visions of democratic expression and with Madisonian "rights-based democracy", institutionalized through divided and separated powers and judicial review.

This is hardly the place to launch a full-blown attempt to resuscitate the so-called "expertise model" of administrative governance. My point is only to notice that the broader vision of accountability that has been sketched here helps us to see that any institutional form is likely to respond to multiple sources of influence and constraint, and thus to participate simultaneously in multiple accountability regimes. The complexity of this vision of legitimateadministrative authority is hardly less dense than the one elaborated in *Reformation*. But it has a different structure.