

BACKGROUND REPORT FOR STATEMENT 9

AGENCY ARTICULATION OF POLICY

Report to the Administrative Conference
of the United States

by

Colin S. Diver

Professor of Law

Boston University

TABLE OF CONTENTS

- I. INTRODUCTION
- II. THE CONCEPT OF RULE PRECISION
- III. METHODOLOGY OF THE STUDY
- IV. CASE STUDIES
 - A. The FAA's Age 60 Rule for Pilot Retirement
 - B. The Definition of "Disability" in the Social Security Disability Insurance Program
 - C. INS Change-of-Status Determinations
 - D. Labor Certification of Immigrant Aliens
 - E. The SEC's "Safe Harbor" Rules for Resale of Unregistered Securities
 - F. Parole Release Guidelines
 - G. Penalty Standards for Hazardous Materials Transportation Act Violations
 - H. Bank Chartering by the Comptroller of the Currency
 - I. Comparative Renewal Broadcast Licensing Standards
- V. RULE PRECISION: OBSERVATIONS AND RECOMMENDATIONS
 - A. Interagency Comparisons
 - B. Recommendations
- VI. CONCLUSION

I. INTRODUCTION

Scholars and judges have spilled vast quantities of ink lamenting the imprecision of legislative delegations to administrative agencies.(1) More recently, despairing of greater legislative precision, critics have increasingly turned their fire on the agencies themselves. As the anointed repositories of sovereign power, administrators have a high duty, we are told, to articulate the conditions under which they will exercise that power.(2)

The Administrative Conference of the United States (ACUS) has been a particularly staunch advocate for administrative articulation of standards. Its most comprehensive--and hortatory--statement of this position can be found in its Recommendation Number 71-3:

Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible.(3)

Several more narrowly focused ACUS Recommendations echo these sentiments. For example, Recommendation 70-2 declared that the Securities and Exchange Commission should:

to the maximum feasible extent state in the form of rules the legal interpretations, the policies, and the standards guiding discretion which it and the Division staff apply in determining registration obligations in the no-action process.(4)

-
1. See, e.g., J. Ely, *Democracy and Distrust* 131-34 (1980); T. Lowi, *The End of Liberalism* 92-126 (2d ed. 1979); Wright, *Beyond Discretionary Justice*, 81 *Yale L.J.* 575 (1972).
 2. E.g., H. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (1962); Davis, *A New Approach to Delegation*, 36 *U. Chi. L. Rev.* 713 (1969).
 3. 1 C.F.R. § 305.71-3 (1981).
 4. Recommendation 70-2(1). For a description of the basis for this Recommendation, see Case Study IV(E) infra.

In Recommendation 71-5, ACUS called upon the Immigration and Naturalization Service to promulgate "regulations which establish the rules and standards for decisions in change-of-status cases." (5) Later Recommendations exhorted the United States Parole Board to "formulate general standards to govern the grant, deferral or denial of parole," (6) the Labor Department to "develop standards" for making alien labor certification decisions, (7) federal grant-making agencies to "state their objectives, criteria and requirements with as much specificity as practicable," (8) and federal banking agencies "to provide a full statement of their objectives" in making chartering or branching decisions, preferably by "policy statements and rules of general applicability, which should be as specific as possible." (9)

The Conference's frequent calls for fuller articulation of administrative policy reflect a variety of concerns. One can discern at least seven distinct objectives at work:

1. To provide greater guidance to members of the public in planning their conduct;
2. To facilitate judicial review of agency action for consistency with statutory objectives;

-
5. Recommendation 71-5(A). See case study IV(C) infra.
 6. Recommendation No. 72-3(A). See case study IV(F) infra.
 7. Recommendation No. 73-2(B), 38 Fed. Reg. 16839, 16840 (1973). See case study IV(D) infra.
 8. Recommendation No. 74-2(B)(4), 39 Fed. Reg. 23041, 23042 (1974).
 9. Recommendation No. 75-1(1), 40 Fed. Reg. 27925 (1975). See case study IV(H), infra. For further examples, see ACUS Recommendations 71-4(2), 1 C.F.R. § 305.71-4 (1981) (criteria for "selection of grantees" under discretionary grant programs); 78-1(A), 43 Fed. Reg. 27507 (1978) ("generic issues" in ratemaking); 78-2(C)(2), 43 Fed. Reg. 27508 (1978) ("regulatory codification of settled or established policies" in Social Security Disability Insurance Claims Administration); 79-3(A), 44 Fed. Reg. 38824 (1979) ("standards for determining appropriate penalty amounts for individual cases" involving administrative assessment of a civil money penalty).

3. To facilitate political review of agency policy for its soundness or acceptability;
4. To enable agency superiors to exercise greater control over the actions of their subordinates;
5. To encourage greater voluntary public compliance with regulatory programs by enhancing their credibility;
6. To reduce the cost of adjudications by focusing participants' energies on decisionally relevant issues; and
7. To provide individuals threatened with adverse outcomes a more meaningful opportunity to participate in the decisionmaking process.

Articulation of policy, in short has been justified as a means to enhance the effectiveness, efficiency, consistency, and acceptability of administrative action.

Why, then, despite these manifold blessings, does one hear such frequent criticism of administrative inarticulateness? One possible explanation is administrative ignorance or neglect--agency heads simply fail to appreciate the benefits of fuller policy elaboration. This hypothesis receives some support from the readiness with which some agencies have responded to criticism of this sort.(10) But the resistance of many other agencies to such advice (11) suggests that the explanation must go far deeper. The precision with which an agency head articulates agency policy must reflect conscious choice far more often than mere inertia or neglect. Agency heads face far too many demands for articulation of policy--from subordinates seeking direction, from the regulated public seeking guidance, from Congress or the White House seeking explanation, from courts seeking justification, and from various self-appointed watchdogs seeking anything from cheap publicity to the Holy Grail--to consign that dimension of their task solely to accident or fate.

One need not search far to imagine at least some of the reasons for administrative resistance to recommendations of the

10. See, e.g., case studies IV(E) (Parole Guidelines) and IV(D) (Labor Certification), infra.

11. See, e.g., Case Studies IV(C) (INS Change-of-Status) and IV(I) (Comparative Broadcast Renewal), infra.

sort described above.(12) Fuller articulation of policy comes at a cost, often a high cost. More specific rules often unavoidably sweep within their coverage forms of conduct that we would not wish to be regulated, or fail to reach conduct that we do wish to regulate. Increased precision often implies an increase in complexity that drives up the cost of applying and interpreting a rule. Writing an appropriately detailed rule can also require a large initial investment in factfinding and evaluation so as to anticipate correctly its consequences in a wide range of applications.

Once one acknowledges--as every serious commentator has--that the drive for increased regulatory specificity is subject to some limit, the problem becomes vastly more complex. How does one tell, when looking at a particular policy, whether it is excessively vague or precise? What advice can one give an agency, embarked upon a course of increasing its rule precision, on where to stop? The ACUS Recommendations cited earlier bear solemn witness to the difficulty of this task. Those who confidently attack agencies for their inarticulateness often lapse into extreme vagueness themselves when pressed to convert condemnation into operational advice.(13) Agencies should "articulate" their "policies" to the "greatest extent feasible."(14) They are admonished to "state their criteria with as much specificity as practicable."(15) What is "feasible"? "Practicable"? "Specificity"? Are these concepts amenable to objective measurement, or are they, like beauty, solely in the eye of the beholder?

The purpose of this report is to tackle these questions. By giving content to the elusive concept of regulatory precision, it seeks to generate a firmer basis for making evaluative judgments about administrative lawmaking and converting these judgments into concrete advice. It begins by examining the various possible meanings of regulatory "precision" and developing, from those options, a workable definition. The report then shifts to methodological questions. After discussing alternative methods of studying rule precision, it develops a simple cost-benefit framework. The next section applies that framework to account for

12. See, e.g., K. Davis, *Discretionary Justice: A Preliminary Inquiry* 28-42 (1969).

13. See Reiss, *Research on Administrative Discretion and Justice*, 23 *J. Legal Educ.* 69, 72 (1970) (criticizing Davis, supra note 12).

14. Recommendation 71-3.

15. Recommendation 74-2.

and evaluate the precision of nine specific administrative policies. The final section draws conclusions and makes recommendations for administrative practices from the findings of these nine case studies.

II. THE CONCEPT OF RULE PRECISION

When we criticize a legal standard (or "rule," loosely defined) as insufficiently "specific" or "precise," what do we mean? A rule is a means of communication -- a prescription or proscription addressed by one party (the "rulemaker") to another party or parties (the object of the rule, who may be a person charged with its implementation, a person whom it is intended to benefit, or a person whose primary behavior it seeks to constrain). "Precision," then, must be a property of the verbal formulation used to embody a rule that relates to the efficacy with which it communicates its intended message.

Legal standards have several properties that bear on the effectiveness with which they perform their intended function. One is "clarity" or "transparency."⁽¹⁶⁾ Transparency is the degree to which a rule evokes a uniform or consistent interpretation in many minds. A transparent rule, like a clear pane of glass, allows each observer to see the same image--to reach the same conclusion about legal consequences when confronted with the same evidence. Transparency obviously enhances the functional utility of a rule by increasing the likelihood that the rulemaker's intention will be communicated without distortion to the rule's audience.

A second property of rules is their simplicity or complexity. A legal standard increases in complexity as the decision rule it specifies grows in sophistication or elaboration. Other things being equal, one rule is more complex than another, the larger the quantity of input (evidence) or the less accessible the inputs demanded by its decision rule; the larger the number of steps required by its decision rule; or the more technical and specialized the process of manipulating the inputs to arrive at a result.⁽¹⁷⁾ Complexity impacts upon a rule's functional utility

-
16. The term "transparency" was used by Jerry Mashaw to describe the same concept. J. Mashaw, *Bureaucratic Justice* (1983). It is similar to Duncan Kennedy's "formal realizability." Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1687 (1976).
 17. See Brodley, *In Defense of Presumptive Rules: An Approach to Legal Rulemaking for Conglomerate Mergers*, in *The Conglomerate Corporation: An Antitrust Law and Economics Symposium* 249, 255-60 (R. Blair & R. Lanzillotti, eds. 1981).

by driving up the cost of its application.

A third property of a legal rule is its fitness, or "congruence," with the underlying policy objective.(18) A congruent rule is one that identifies as proscribed (or mandatory or permitted) only that behavior that "ought"--under the rulemaker's governing normative system--to be proscribed (or mandated or permitted). A prohibitory rule's congruence declines, for example as it sweeps within its coverage more and more actions whose prevention would defeat the rulemaker's goal, or as it fails to reach more and more actions whose occurrence would defeat the rulemaker's goal. Congruence, in this sense, is an essential determinant of the efficacy of a rule's verbal formulation in achieving its intended outcome.

A call for better "articulation" of policy or increased "specificity" might implicate any one or all of these three properties. The critic might be lamenting the opacity, complexity, or incongruity of an existing verbal formulation. One can see evidence of all three themes in the critical literature, including the various ACUS Recommendations and their supporting studies. But the dominant theme is the opacity--the lack of transparency--of the standards applied by the agencies studied. These criticisms evoke a longstanding concern in administrative law about the breadth of legislative "delegations" and administrative "discretion."(19) There is no shortage of critics to bemoan the substantive perversity or Byzantine intricacy of administrative policies. But the school of criticism symbolized by the ACUS reports has zeroed in on a different perceived ailment--the propensity of too many administrators, for lack of wit, wisdom, or will, to consign the policies they enforce to a permanent state of obscurity.

For this reason, I have adopted the concept of rule "transparency" as my dependent variable. That is not to say that rule complexity and congruence do not feature prominently in the study. They do, but as explanatory or independent variables, rather than as the object of study. As we shall see, attempts to increase a rule's transparency typically affect--usually in an adverse fashion--its complexity or congruence. Consequently, a careful examination of the one necessarily implicates the other two, and any effort to construct a theory to explain or evaluate

18. Paul Brest uses the term "congruence" to refer to the "fit" of a legislative classification to the legislature's underlying goal in the context of constitutional "rational basis" review. P. Brest, *Processes of Constitutional Decisionmaking: Cases and Materials* 478, 480 (1975).

19. See notes 1 & 2 supra.

the degree of transparency will implicate, as explanatory or justificatory variables, congruity and complexity.

III. METHODOLOGY OF THE STUDY

Like the criticisms that inspired this study, this report is essentially normative in nature. That is, it attempts to provide a basis for reaching an evaluative judgment about a particular aspect of administrative behavior. Is this particular administrative standard articulated with the proper degree of clarity? Should its transparency be increased? Should the agency have adopted a particular clarifying amendment proposed or considered?

Degree of rule precision occupies an important place in virtually any coherent school of legal philosophy.(20) Clarity in rules can promote such fundamental normative goals as providing fair notice and assuring evenhanded treatment.(21) Yet invocation of such a priori moral values does not furnish a very promising means of assessing particular verbal formulations. For excessive precision of legal rules can offend equally compelling values of participation and individualized treatment.(22) Except perhaps at the extremes of complete obscurity or mechanistic formula, evaluating the work-product of particular rulemakers threatens to degenerate into an irreconcilable clash of warring principles.

Rather than try to settle such disputes by invoking moral absolutes, I have adopted a method that attempts, however crudely, to measure and compare the competing interests at work in an effort to locate the appropriate balance. Adopting this approach converts the argument from the elevated rhetoric of moral

-
20. See, e.g., R. Dworkin, Taking Rights Seriously 14-80 (1977); H.L.A. Hart, The Concept of Law 120-50 (1961); Christie, The Model of Principles, 1968 Duke L.J. 649; Raz, Legal Principles and The Limits of Law, 81 Yale L.J. 823 (1972).
 21. For a particularly emphatic statement of the moral force behind demands for legal clarity, see L. Fuller, The Morality of Law (rev. ed. 1969).
 22. See, e.g., J. Shklar, Legalism (1964); Tribe, Structural Due Process, 10 Harv. C.R.-C.L.L. Rev. 269 (1975).

principle to the crasser language of costs and benefits.(23) But it provides a more hopeful basis for making the unavoidable trade-offs entailed in decisions about rule precision.

The first task in applying this method is to catalog the possible consequences, favorable and unfavorable, of varying the degree of a rule's transparency. To illustrate, imagine a choice between two simple versions of a retirement rule for commercial airline pilots:(24)

Model I: "No person may serve as a pilot on a commercial airplane if that person has reached his sixtieth birthday."

Model II: "No person may serve as a pilot on a commercial airplane if that person's physical and mental condition create an unreasonable risk of accident."

Several considerations argue in favor of Model I. Model I may produce a higher level of compliance than Model II. It is easier (cheaper) for pilots to apply to their own situations than II. Pilots will be able more accurately to predict how the rule will be applied by those charged with its enforcement (and therefore what consequences will flow from various events or states of the world). They might also find a clear rule more morally acceptable and hence worthy of voluntary obedience. Put another way, pilots are less likely to make costly (and frequently effective) efforts to evade or sabotage the rule.

Model I also seems easier (cheaper) to enforce. If it increases compliance, there will be fewer violations to process. If it increases accuracy of prediction, there will be fewer requests for interpretation to process. And since it is highly objective, the disputes that do arise can be resolved quickly and accurately. Model II, by contrast, will generate numerous and expensive conflicts. In the absence of clear standards,

23. The framework has been most fully developed by Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 *J. Legal Studies* 257 (1974). See also G. Tulloch, *Trials on Trial: The Pure Theory of Legal Procedure* 184 (1980).

24. See case study IV(A) (FAA age-60 rule), *infra*.

factfinding and offers of proof will range far and wide. Great effort will be expended on interpreting the meaning of the standard and, in effect, making successive elaborations of its meaning in individual cases.

Not so fast, say Model II's champions. Increased compliance is counterproductive if the rule induces the wrong behavior. Rule I will burden society by depriving it of the services of safe, experienced sexagenarians. Even the claim of Model I's lower transaction costs must be tempered with some healthy skepticism. Arbitrary rules inevitably invite demands for modification. The proponent of Model I will spend his days defending his rule against attacks and probably will end up making some sort of provision for granting exceptions in deserving cases. Processing petitions for waiver will consume many of the same social resources required for the administration of Model II.

Varying the degree of precision with which a rule is expressed, then, can have an impact on both the primary behavior of the rule's addressee and upon the transaction costs associated with administering the rule. Refining these concepts further, one can identify four principal subcategories of potential costs and benefits:

1. Rate of Compliance

Increased rule precision may increase the rate of compliance with a rule (and decrease evasion or concealment costs) by reducing the cost, to the rule's addressee, of determining how the rule will apply to his intended conduct, and by raising the addressee's estimated probability that undesirable conduct will be punished or desired conduct will be rewarded. If increasing a rule's transparency causes it to become more complex or less congruent, however, at some point further clarification may reduce the rate of compliance by driving up the cost of locating the applicable provision or by reducing the rule's moral acceptability.

2. Congruence

Increasing the precision of a rule increases the risk of unintended over- or under-inclusiveness. This may result from the rulemaker's inability to predict all of the consequences of applying the rule or all of the circumstances to which it may apply. While presumably the rulemaker can later change the rule upon learning of the misfit, social losses will be incurred in the interim. The cost of subsequently amending the rule is also an ingredient of the cost of over- or under-inclusiveness.

On the other hand, a relatively opaque rule, though facially congruent, may be over- or under-inclusive in application, because vagueness invites misinterpretation. Increasing a rule's transparency may, therefore, substitute "errors of

misspecification" for "errors of misapplication." The relative magnitudes of the social losses occasioned by each type of error will determine the net congruence gain or loss.(25)

3. Rulemaking Costs

Writing a transparent rule may require a larger initial investment of resources in obtaining and evaluating information. This cost is at least a partial substitute for the costs of over- or underinclusiveness. More careful initial analysis reduces the scope of misspecification and its attendant costs. Rulemaking also typically requires the accommodation of conflicting views. This is especially true of collegial bodies, but is in fact true of most hierarchical agencies as well. The more precise a rule, the larger the range of agreement necessary and consequently the higher the costs of reaching agreement.(26) A related cost, from the rulemaker's perspective, is the risk that enhanced visibility of policy may increase political criticism (and thereby increase agency costs of blunting the criticism).

On the other hand, greater initial precision can reduce the need for future rulemaking activity by leaving fewer policy questions open for later resolution. An investment in more precise draftsmanship can thus reduce the volume of resources that must be devoted either to subsequent "common-law" rulemaking (elaboration of reasoned justifications in individual cases having precedential value) or to subsequent generic "legislative" rulemaking. Enhanced initial rule transparency can also reduce the agency's subsequent investment in internal quality-control mechanisms, such as employee training or auditing to assure consistency and correctness of decisions made by individual enforcement personnel.

4. Dispute Resolution Costs

Greater rule precision can reduce the number of disputes to be decided (by increasing the rate of compliance) and reduce the cost of resolving those disputes that do arise (by focusing disputants' energies more exclusively on relevant matters and by causing their predictions of the outcome to converge). On the other hand, the increased complexity or reduced congruence that frequently accompany clarification may well drive litigation costs up.

25. See Mashaw, Administrative Due Process as Social-Cost Accounting, 9 Hofstra L. Rev. 1423, 1430-36 (1981).

26. See Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263, 289 (1982).

Having classified the various consequences flowing from a change in rule precision into these four categories, one must specify a decision rule for drawing an ultimate normative judgment about any particular rule formulation. The procedure implicit in the approach sketched above, of course, is to aggregate the impacts under the four categories into one overall "score." Theoretically, one can evaluate any particular verbal formulation, taken in isolation, merely by looking at the sign of its score (positive=acceptable; negative=unacceptable). In practice, however, normative judgments about rule precision tend to be useful only on a comparative basis. One verbal formulation is either more or less desirable than another. Consequently, the case studies that follow will typically involve comparisons between two or more alternative versions of a rule (proposed or adopted) rather than absolute judgments about existing versions.

Applying this decision rule to actual cases requires an ability to do two things: 1) to rank (at least ordinally) two or more alternative rule formulations in terms of their degree of precision; and 2) to compute and aggregate the various costs and benefits associated with each (or of shifting from one to another). My earlier definition of "transparency" suggests a way to "measure" degree of rule precision. Present a random sample of a rule's intended audience with a series of hypothetical questions requiring its application to concrete situations. The ratio of agreement among the respondents would then be a suitable measure of its "transparency." Similarly, one can in principle compute the costs and benefits flowing from a change in rule precision, either by carefully collecting and statistically analyzing data on the consequences of an actual amendment, or by conducting a carefully controlled experiment.

Formidable obstacles stand in the path of such an endeavor. Aside from its obvious cost, empirical measurement of precision and its consequences confronts rather ticklish conceptual problems, as well. For example, combining the several elements of a complex rule into one overall "precision rating" is unavoidably judgmental. Superficially, a rule with a larger proportion of transparent words or phrases may seem more "precise." But one really needs to know the relative number and social importance of the controversies foreclosed (by the transparent elements) or left open (by the opaque elements). An extraordinarily transparent rule with an open-ended exemption clause, for example, may, by channeling all of the controversy into demands for exemptions, be little better than no rule at all. A survey administered to a sample of a rule's audience must therefore be carefully structured to reflect the distribution of conditions or behaviors that the rule will actually confront.

Another methodological difficulty is isolating the effects of changes in rule precision from the other changes constantly

occurring in any regulatory program. Any change in the precision of a rule necessarily involves a simultaneous change in its substantive content. Changing words changes meanings. Sometimes, the nature of the substantive shift is clear enough, but isolating its impact on, say, compliance rates or transaction costs, from the impact of a shift in the degree of precision is nonetheless difficult. Other times, the nature and magnitude of the substantive policy shift itself is obscured by the very opacity of the original standard. Changes in a rule's content may also be accompanied by changes in the procedure for its enforcement whose implications cannot easily be disentangled from consequences of the formal amendment.

What emerges as the most important variable in many cases--incongruity effects--presents an additional conceptual problem. How can one determine the true "goal" of the program in question (with enough specificity to "measure" congruence losses resulting from over- or under-inclusive language) without relying on the very verbal formulation selected by the agency in which to embody its policy? This conceptual dilemma has long bedeviled "rational basis" review of statutes.(27) It is somewhat more tractable in the present context than in that context, since one can draw some guidance, in the search for a rule's the background statute. But, the organic act is often itself too vague to provide much operative guidance. Ironically, the legislative delegations that cry out most plaintively for administrative clarification can, by their very obscurity, defeat the mode of analysis advanced here.

My principal response to these objections is to plow ahead in spite of them. Limitations on the scope of this project preclude the extensive original data gathering and analysis that would be required to quantify degrees of rule precision or their attendant consequences. But an intuitive reading of regulatory language will usually support a defensible ordinal ranking of rule formulations. Reported data, secondary commentary, and participants' observations can, moreover, support at least a qualitative assessment of costs and benefits. And the

27. See, e.g., P. Brest, supra note 18, at 565-66; Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970); Gunther, The Supreme Court, 1971 Term -- Foreword: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

difficulties of causation and goal-definition averted to above can be held to manageable dimensions by making a few plausible intuitive assumptions.

Rather than relying on the more prevalent approach of intensively studying a single agency or program, I have utilized the more extensive methodology of multiple case studies. This approach permits comparative analysis across a wide range of contextual dimensions, such as the size and composition of the rulemaking body, the kinds of primary outcomes desired by the rule's authors, the type of administrative function involved, the size and interests of the rule's audience, and the organization and complexity of the mechanism used to enforce the rule. A comparative study helps to highlight the significance of these and other variables for judgments about rule precision.

The following nine case studies have been selected

1. The Federal Aviation Administration's "age 60 rule" for pilot retirement;
2. The Social Security Administration's definition of "disabled" under the Disability Insurance Program;
3. The Immigration and Naturalization Service's criteria for adjusting the status of nonimmigrant aliens to permanent residence;
4. The Labor Department's rules for certifying aliens for domestic employment;
5. The Security and Exchange Commission's definition of "underwriter" for purposes of exempting resale of restricted securities from the registration requirement;
6. The United States Parole Commission's guidelines for parole release;
7. The Transportation Department's criteria for assessing money penalties for Hazardous Materials Transportation Act violations;
8. The Comptroller of the Currency's policy governing chartering of national banks; and
9. The Federal Communications Commission's comparative broadcast license renewal standards.

Two selection principles were used. The first was the ready availability of information or commentary relating to the precision of the policy in question. Seven of the case studies

(all but numbers 1 and 7) are based on studies previously sponsored by ACUS, five of which (numbers 3, 4, 5, 6, and 8) generated explicit recommendations for further articulation of the policy in question. In addition, case study number 7 builds on previous work done by the present author that grew out of an ACUS study. Case study 1, finally, focuses on a celebrated and well-documented illustration of extreme verbal transparency and simplicity.

The second selection criterion was balance. While no systematically random process was used, I did seek to produce a portfolio of case studies that was balanced in terms of the contextual elements discussed above. For example, three case studies (5, 6, 9) involve collegial rulemakers ("independent" agencies), and six, hierarchical rulemaking agencies. Types of administrative function involved include occupational or business licensing (1, 8, 9); dispensation of benefits or privileges to individuals (2, 3); regulation of primary conduct (4, 5); and imposition or determination of sanctions (6, 7). Individuals comprise the principal audience of four rules (1, 2, 3, 6) and businesses the other five. The enforcement mechanism ranges from highly decentralized (2, 3, 4) to highly concentrated (5, 8, 9). Annual caseload volumes range from under a hundred (9) to over a million (2). The procedures available for persons contesting the application of the rule run the gamut from extreme informality (5, 6, 8) to extreme formality (2, 3, 9).

The next section of this report contains separate descriptions of each case study, while the following section summarizes the general findings and recommendations that can be gleaned from them as a group. Each study begins with a description of the policy context and chronicles significant adopted or proposed changes in the verbal formulations used by the administering agency to implement the policy. The second half of each study analyzes and evaluates these changes in terms of the independent variables discussed above.

IV. CASE STUDIES

A. The FAA's Age 60 Rule for Pilot Requirement

The Federal Aviation Act of 1958 authorized the Federal Aviation Administration (FAA) "to promote safety of flight of civil aircraft," giving "full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest."⁽²⁸⁾ Among the

28. 49 U.S.C. § 1421 (1980).

more specific charges, the law instructed the FAA to "develop reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen"(29) The Act evinced an almost monolithic concern for maximizing safety of air transportation.

As part of its program to implement the Act, the FAA promulgated the so-called Age 60 Rule in 1959, to be effective on March 15, 1960:

No individual who has reached his 60th birthday shall be utilized or serve as a pilot on any aircraft while engaged in air carrier operations.(30)

In explaining the basis for the rule, the FAA Administrator expressed concern about "the progressive deterioration of certain important physiological and psychological functions" thought to be associated with age.(31) The decision that age was a legitimate consideration was reinforced by the perceived inability to develop an alternative means to identify unsafe pilots on an individual basis:

Any attempt to be selective in predicting which individuals are likely to suffer an incapacitating attack would be futile under the circumstances and would not be medically sound.(32)

Although the agency conceded that "available data does not permit any precise determination of the age at which continued activity as a pilot can be said conclusively to constitute a hazard to safety under normal or emergency conditions of flight,"(33) the age-60 cut-off was selected

29. 49 U.S.C. § 1421(a)(5) (1980).

30. 24 Fed. Reg. 9773 (1959).

31. 24 Fed. Reg. 5248 (1959) (notice of proposed rulemaking).

32. 24 Fed. Reg. 9772 (1959).

33. 24 Fed. Reg. 5249 (1959).

for lack of any more defensible alternative. The FAA did, however, suggest a willingness to consider modifying the rule as new evidence became available:

While Medical science may at some future time develop accurate, validly selective tests which would safely allow selected pilots to fly in air carrier operations after age 60, safety cannot be compromised in the meantime for lack of such tests.(34)

Nonetheless, the rule as it stands today is almost identical to the original:

No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.(35)

During the rule's 22 year life the FAA has steadfastly resisted pressures to amend it. As recently as 1979, an FAA deputy administrator summarized its position for Congress:

Intervening years have not eliminated the basis that led to the administrator's decision in 1959 We are still unable to adequately and timely identify those older individuals who would represent a hazard to safety.(36)

34. 24 Fed. Reg. 9772 (1959).

35. 14 C.F.R. § 121.383(c) (1981).

36. Age Discrimination Against Airline Pilots: Hearings Before the Select House Comm. on Aging, 96th Cong., 1st Sess. 44, 46 (1979) [hereinafter cited as Select Comm. Hearings] (statement of Quentin S. Taylor, Deputy FAA Administrator).

Administrator Langhorne Bond confirmed later in the year that FAA had "reached the conclusion that the rule is currently valid," while acknowledging that "the present system is 'arbitrary' to a large degree."(37)

The FAA has sponsored several efforts to develop a more individualized test for pilot decertification. Shortly after promulgating the Age 60 Rule, the FAA launched a study "to tailor a retirement standard for each pilot instead of requiring all to retire at the age of 60."(38) The predicted amendment never ripened into reality, however. The study was abandoned some 5 years and \$2.5 million later amid "serious questions."(39) The FAA later contributed funds to a study conducted by the Lovelace Foundation. While this 11 year study produced some encouraging findings, its results were never translated into action by the FAA.(40) The FAA also contributed an annual \$75,000 to an ongoing Navy study of 1000 aviators, but, again, found its results (released in 1978) inconclusive.(41)

Although the FAA has recently withdrawn from sponsoring research itself, it has established a small office to monitor outside research, and, in 1979, it contracted for a thorough review of the state of the art.(42)

-
37. To Eliminate Age Limitations Presently Imposed on Certain Pilots of Aircraft: Hearings on H.R. 3948 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 96th Cong., 1st Sess. 12 (1979) [hereinafter cited as Aviation Subcomm. Hearings] (letter from Langhorne Bond to Congressman Jim Lloyd, June 27, 1979).
 38. N.Y. Times, Mar. 11, 1962, at 88, col. 1 (statement of FAA Administrator Najeeb Halaby).
 39. Aviation Subcomm. Hearings, supra note 37, at 44.
 40. Id. at 88 (testimony of Dr. R. Bruce).
 41. Id. See MacIntyre et al, Longevity in Military Pilots: 37 Year Fellowship of the Navy's "1000 Aviators," Aviation, Space & Env'l Medicine, Sept. 1978, at 1120.
 42. See Pilots' Rights Ass'n, Inc. v. FAA, 86 F.R.D. 174, (1980).

Throughout its lifetime, the Age 60 Rule has drawn constant criticism for its overinclusiveness. The rule's earliest and, until recently, most persistent critic has been the Air Line Pilots Association (ALPA). After unsuccessfully opposing the rule's initial adoption,(43) ALPA turned to the courts. Its challenge to the rule's rationality in the case of ALPA v. Quesada failed, however, producing this characteristically deferential judicial response:

It is not the business of the courts to substitute their judgment for the expert knowledge of those who are given authority to implement the general directives of Congress.(44)

Subsequent efforts to enlist judicial support in the attack on the rule have proved equally unavailing. Encouraged by a suggestive footnote in the Quesada case,(45) several pilots petitioned the FAA for exemption from the Age 60 Rule pursuant to a statutory provision that authorizes the Administrator to "grant exemptions . . . if he finds that such action would be in the public interest."(46) But the FAA promptly denied all petitions for exemption and was uniformly upheld on appeal.(47) Although the courts did not struggle very hard to give meaning to the exemptions provision, one of the courts did at least deliver a few words of warning to the FAA:

At some point, the state of the medical art may become so compellingly supportive of a capacity to determine functional age equivalents in individual cases that it would be an abuse of discretion not to grant an exemption.(48)

-
43. See Comment, Mandatory Retirement of Airline Pilots: An Analysis of the FAA's Age 60 Retirement Rule, 33 *Hastings L.J.* 241, 245-46 (1981).
44. *Air Line Pilots Ass'n, Int'l. v. Quesada*, 276 F.2d 892, 898 (2d Cir. 1960).
45. 276 F.2d at 898, n. 10.
46. 49 U.S.C. § 1421(c) (1981).
47. *Keating v. FAA*, 610 F.2d 611 (9th Cir. 1980); *Rombaugh v. FAA*, 594 F.2d 893 (2d Cir. 1979); *Gray v. FAA*, 594 F.2d 793 (10th Cir. 1979); *Starr v. FAA*, 589 F.2d 307 (7th Cir. 1978). See also *O'Donnell v. Schaffer*, 491 F.2d 59 (D.C. Cir. 1974).
48. *Gray v. FAA*, 594 F.2d 793, 795 (10th Cir. 1979).

Having failed to secure relief from the agency or the courts, ALPA shifted the battleground to Capitol Hill. After complaining to Congress in 1969 that the "FAA has rejected each and every request for a[n] exchange of news with ALPA concerning the age 60 regulation,"(49) ALPA did succeed in convincing the FAA to reopen the issue. But, after holding informal public hearings in October 1971, the FAA denied petitions to rescind the rule in March 1972.(50)

More recently, ALPA has helped to instigate a growing group of age-conscious Congressmen to hold hearings aimed at sensitizing the FAA. During his confirmation hearings in 1977, a senate committee elicited a promise from Langhorne Bond to look into the matter personally.(51) Later that year, he made this report on the results of his investigation:

I would favor replacing the age 60 rule with a system based on a psycho-physiological age index if I could be satisfied that a proven scientific basis exists and a feasible mechanism could be devised which could replace this rule while providing an equivalent level of safety. From my review of this matter, I am convinced that this capability has not yet been reached.(52)

Dissatisfaction with the FAA response, fed by growing support for the ALPA claims in the medical and scientific community, prompted Congress to consider directly modifying the age 60 rule. Several bills to modify the rule were introduced in 1979, but all failed. Congress did, however, adopt legislation directing the National Institutes of Health to conduct a study to determine whether the rule was "medically warranted."(53) NIH designated the National Institute on Aging as the unit responsible to conduct the study.

49. Select Comm. Hearings, supra note 36, at 1369 (ALPA statement).

50. Id. at 46-47 (testimony of Quentin Taylor, Deputy FAA Administrator).

51. Id. at 47.

52. Id.

53. Pub. L. 96-171, 93 Stat. 1285 (1979).

While the study was pending, the ALPA Board of Directors voted to abandon its longstanding opposition to the age 60 rule, citing its success at adjusting pilots' salaries and pensions to the age 60 retirement date.(54) In the meantime, however, a group of dissident pilots formed an organization called the Pilots' Rights Association to carry on the movement for reform.(55)

In August of 1981, the National Institute on Aging issued its report, urging the retention of the age 60 rule.(56) The report acknowledged that "there is no convincing medical evidence to support age 60, or any other specific age, for mandatory pilot retirement."(57) But it did conclude, from examining "available actuarial and epidemiological data," that the probability of "accidents attributed to acute or subtle incapacitation" of pilots would increase with an increase in pilot age.(58) After examining a wide array of medical and performance simulation tests, the NIA panel found none able reliably to predict loss of function with sufficient accuracy to replace the simple age criterion.(59)

The Age 60 Rule is pure Model I: almost perfectly transparent and elementally simple. The history of the rule suggests two obvious questions: What is it about this particular subject that has led the FAA to adopt this strategy, and why, having adopted it, has the FAA maintained it so stubbornly? Model I formulations are likely to seem especially attractive when enforcement is particularly difficult or costly. These considerations might plausibly have motivated the FAA in 1959, even though its official explanation for the rule makes scant mention of them.(60) Involuntary retirement can exact a heavy toll on the unwilling

54. ALPA, Comments Concerning the Institute of Medicine Report, in Report of the National Institute on Aging Panel on the Experienced Pilots Study C-19, C-39 to -40 (August 1981) [hereinafter cited as NIA Report].

55. See Technical Comments of Pilots' Rights Ass'n, id. at C-165.

56. Id.

57. Id. at 2.

58. Id. at 4.

59. See id. at 4, 7.

60. Id. 24 Fed. Reg. 9772-73 (1959).

pilot, in foregone income(61) and loss of professional satisfaction or self-esteem. Many pilots would presumably be willing to go to considerable lengths to avoid those consequences, either by evading the requirement or by challenging its application to them. Combatting evasion or responding to challenges could consume substantial resources. A bright-line retirement standard presents an attractive solution to the problem of minimizing these costs.

On reflection, however, the attraction of this explanation diminishes. In the first place, neither evasion losses nor rule-enforcement transaction costs could have appeared especially momentous in 1959. The risk of evasion, in particular, was inconsequential. Only a handful of airline pilots were then approaching retirement age. Although the FAA correctly foretold a substantial increase in the pilot population, only 80 airline pilots would have passed age 60 by 1962.(62) Piloting commercial aircraft, moreover, is a very visible activity, and the FAA could count on the carriers to help it police any reasonable retirement policy.(63)

The transaction-cost savings are somewhat more impressive. Disqualification from piloting commercial aircraft is a sufficiently severe deprivation to warrant a trial-type hearing of contested issues. Enforcement of a discretionary retirement standard, consequently, could generate very expensive proceedings involving a high proportion of the pilots to whom it was applied. Nonetheless, one must discount this cost by the "hidden" transaction cost of maintaining an arbitrary rule. The same large personal stakes that spawn litigiousness will also generate attacks on the rule itself. The history of the Age 60 Rule is a case in point. Efforts to soften the rule's hard edges, by nullification, amendment, and waiver, have consumed a vast, if

-
61. Today, pensions average about 50 percent of pre-retirement salaries. For captains employed by major airlines, the resulting loss of income ranges from \$30,000 to \$50,000. NIA Report, supra note 54, at C-73 to -74 (Statement by Air Transport Ass'n). The financial impact of retirement in 1959 was more severe, since pensions were less generous in relative terms.
 62. See 24 Fed. Reg. 5248 (1959).
 63. Not only are carriers concerned to maintain good relations with the FAA, but they have consistently supported mandatory retirement at age 60. See NIA Report, supra note 54, at C-51 (Statement of Air Transport Ass'n).

unmeasured, quantity of social resources. The FAA has itself expended over \$3 million on defensive studies, a sum undoubtedly dwarfed by the resources expended by ALPA, Congress, the courts, NIA, and other participants in the continuing controversy. One wonders whether the costs of administering a more discretionary criterion would have exceeded these hidden transaction costs. In explaining the FAA's 1959 decision, however, it is perhaps not immaterial that most of these costs have been borne by others.

In addition to these consequential transactional costs, one must consider the incongruity losses occasioned by the use of so sharp a dividing line. Prematurely grounding healthy pilots can involve two complementary forms of social cost: 1) the cost of training adequate replacements, or 2) the differential accident losses caused by insufficiently trained replacements. Even an agency so monolithically concerned with maximizing airline safety(64) should be responsive to costs such as these. Yet the 1959 FAA quite evidently was not troubled by these possible incongruity losses. One reason for this lack of concern related to contemporaneous developments in aircraft technology. The airline industry was beginning to introduce turbojet aircraft into commercial aviation on a large scale in the late 1950s. Operation of the new aircraft, even by experienced pilots, required extensive training. In fact, far from being concerned for the cost of replacing experienced pilots, the FAA expressed doubt whether any amount of retraining could break senior pilots of old habits well enough to assure proper response in emergency situations.(65)

A second reason for the FAA's apparent disregard of incongruity costs was the asserted absence of any better discriminant than age.(66) Granted, the FAA seemed to be saying, age is only a crude proxy for the presence of incapacitating conditions. But it does no good to bemoan the crudeness of that proxy unless a better predictor can be found. A predictor that permits pilots to fly past age 60 will, indeed, reduce the number of false negatives (robust pilots grounded), but only at the cost of increasing the number of false positives (unsafe pilots continued in service). It is possible -- though hardly evident

64. See 24 Fed. Reg. 9773 (1959).

65. Id. at 9772-73.

66. Id. at 9773.

from the FAA's terse explanation for its rule(67) -- that the agency systematically estimated error rates for a variety of plausible alternatives. But it seems more likely that, having discounted the social cost of false negatives to nearly zero, it simply presumed that any increase in false positives would be intolerable.

If the case for the rule's original adoption rests heavily on the introduction of turbojet aircraft and the infancy of medical science, on what does the rule's retention in 1982 rest? The calculus clearly has changed. Transaction costs provide a much weightier argument for a Model I rule now than in 1959. The success with which ALPA has adapted pilot compensation plans to the reality of age 60 retirement--as evidenced by its recent about-face(68)--foretells a sharp reduction in organized attacks on the rule. Yet, the personal stakes for each retiring pilot--\$30,000 to \$50,000 per year(69)--are still large enough to guarantee a high level of individual litigation. With roughly 700 airline pilots reaching age 60 each year,(70) the potential transaction costs of administering a discretionary scheme have multiplied.

Yet so have the incongruity losses entailed by a hard-and-fast rule. No dramatic revolution in aircraft technology threatens the present generation of senior pilots with obsolescence. Data on aviation safety suggests, moreover, that the incidence of accidents declines steadily with pilot age, at least up to age 55 or 60.(71) At an estimated cost to train a new pilot of \$250,000,(72) the replacement tradeoff begins to look a good deal less favorable than it did in 1959.

Time has also eroded the "lack of alternatives" argument. Much progress has been made in developing reliable measures for

67. Id.

68. See text at note 54 supra.

69. See note 61 supra.

70. In 1979 there were about 3500 pilots in the 55-59 age cohort. NIA Report, supra note 54, at F-32.

71. NIA Report, supra note 54 at F-50 (commercial aviation: incidence declines to age 55, rises slightly thereafter), F-51 (general aviation: decline to age 60).

72. Id. at C-37 (statement of ALPA).

many important physiological functions.(73) Yet, as testing techniques have become more sophisticated, so has our appreciation of the conditions for successful pilot performance. The NIA panel concluded that there remain many critical functions, especially intellectual and psychological, for which no better discriminant than age has been found.(74) Unfortunately, most accident-producing pilot errors are attributable to malfunction of these processes.(75) Recent progress in developing testing procedures, in short, cannot guarantee a substantial reduction in the volume of false positives that an individualized screening process would generate.

The ultimate balance is not easy to strike. One can say with assurance only that in the 23 years since 1959, the stakes have risen on both sides of the calculation. The waste of skilled pilot manpower languishing in premature retirement is unquestionably much greater today. But, then, so is the number of lives that a more individualized screen would unavoidably entrust to aging pilots with undetectable risks. In the weighing of such imponderables, even a modest gain in transaction costs may be justification enough.

B. The Definition of "Disability"
In The Social Security Disability Insurance Program

The Social Security Disability Insurance (DI) Program was enacted in 1956 and began operation the following year. The DI program pays benefits to wage earners enrolled in the Social Security program who lose their jobs as the result of a "disability." Dependents of disabled workers also qualify for benefits. The amount of the monthly benefit is a function of the worker's predisability wage rate, age, and number of dependents, and is subject to a ceiling. In 1978, for example, the average monthly benefit for an individual disabled person was \$328 (up from \$118 in 1969) and for a family was \$639.(76) DI benefits are paid during the period of disability until its termination, death, or age 65 (at which time the recipient shifts to the Old-Age and

73. See id. at F-23 to -26.

74. Id. at F-20.

75. See Select Comm. Hearings, supra note 36, at 106 (statement of Dr. S. Mohler).

76. Senate Finance Comm., Rep. No. 96-408, to accompany H.R. 3236, Nov. 8, 1979, at 11.

Survivors Insurance program). A 1978 study estimated the average DI claim to be worth \$25,000 (present value of future benefits) to the applicant.(77)

Both the size and rate of growth of program costs are staggering. Total benefit payments have grown from \$457 million in 1959, to \$2.5 billion in 1969, to \$13.4 billion in 1979.(78) During that time administrative costs have increased from \$34 million to \$377 million.(79) The criteria used to determine eligibility have momentous fiscal and human implications. In 1980, for example, 1.2 million people applied for DI benefits.(80) At the estimated \$25,000 average value per claim, some \$30 billion of potential claims against the DI Trust Fund hinged on the application of those criteria. A determination of eligibility has additional fiscal implications, because many DI recipients also qualify for Medicare and Medicaid. In 1979, payments under these programs to DI recipients were estimated at \$7.3 billion.(81) On any reasonable assumption about the condition of those applicants, moreover, the magnitude of human suffering represented by those seeking relief in any one year is staggering.

-
77. J. Mashaw et al., Social Security Hearings and Appeals 15 (1978).
 78. 1961 Social Security Bull., Ann. Statistical Supp. 11; 1969 id. at 46; 1979 SSA Ann. Rep.
 79. Schohel, Administrative Expenses Under OASDHI, Social Security Bull., March 1981, at 22.
 80. Status of the DI Program, Subcomm. on Social Security of the House Ways and Means Comm., March 16, 1981, at 23 (Comm. Print 97-3).
 81. Senate Finance Comm., supra note 76. The definition of "disability" has even further fiscal consequences, since the same eligibility standard is used to award benefits under the Supplemental Security Income program. In 1979, one million claims were filed under the SSA Blind/Disabled program and 4.2 million disabled persons were receiving \$6.6 billion in SSI benefits. Id. at 4.5.

The disability determination process has several steps.(82) Initial determinations are made by state health or vocational rehabilitation agencies under contract with The Social Security Administration (SSA). Initial decisions are based on written evidence furnished by the claimant and reports of medical examination and consultation with a vocational counselor. A claimant may request reconsideration of an unfavorable decision based on the record or any further evidence he wishes to submit.

Denial on reconsideration entitles the applicant to request a hearing before an SSA administrative law judge. These hearings have a far more inquisitorial than adversarial character. Disappointed claimants have a right of further appeal to SSA's Appeals Council and to the federal courts.

Since 1954 the statutory and regulatory criteria for determining DI eligibility have undergone periodic change. The 1954 statute defined "disability" quite simply, as:

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration....(83)

The two concepts introduced by that provision -- "substantial gainful activity" (SGA) and "physical or mental impairment" (PMI) -- have remained central to the legal definition of disability ever since.

SSA issued its first interpretive rules in 1957.(84) The definition of disability, in retrospect, is remarkably brief and indefinite. Aside from enumerating factors to be considered (severity of impairment being "primary," others being education, training, and experience), the rules' most transparent gesture was a list of nine impairments "which would ordinarily be considered

82. For a brief description, see Schwarz, Adjudication Process Under U.S. Social Security Disability Law: Observations and Recommendations, 32 Ad.L.Rev. 555 (1980).

83. Pub. L. 761, 68 Stat. 1080 (1954).

84. 22 Fed. Reg. 4362 (1957), inserting 20 C.F.R. §404.1501(d).

as preventing substantial gainful activity...."(85) Items on the list were quite brief and heavily dependent on judgmental terms (for example "Loss of use of two limbs," "severe loss of judgment").

In two amendments adopted in 1961, SSA took its first steps toward greater rule transparency. The first added the predecessor of the "medical appendix" -- a set of detailed instructions forefficiency. The measurement of visual acuity should include a report of refraction and be based upon the best corrected ascertaining the relative "severity" of various classes of medical impairments.(86) Detailed as they are, the instructions still relied almost exclusively on judgmental concepts and nonexclusive lists of decisional factors. For example:

§404.1512 Impairments of vision and hearing.

(a) Visual impairments. In measuring visual efficiency, the primary factors considered are central visual acuity, field of vision and muscle function. The determination of visual capacity depends upon accepted methods of measuring visual acuity for distance and near vision. Central fields may also be done where indicated but are not satisfactory unless accompanied by a report of peripheral field. Peripheral field of vision should be measured by use of the perimeter with suitable distance and test object.(87)

No threshold level of performance is specified for any of the impairments listed.

The second rule introduced the "work test" for determining whether work performed during the period of the alleged disability demonstrates ability to perform "substantial gainful activity."(88) While these rules rely primarily on a list of

85. Id.

86. 26 Fed. Reg. 5572 (1961), inserting 20 C.F.R. §§404.1510-.1519.

87. 20 C.F.R. §404.1512 (1962).

88. 26 Fed. Reg. 11049 (1961), inserting 20 C.F.R. §§404.1532-.1537.

judgmental factors to be considered (for example, whether duties performed were "significant"(89) or job performance was "adequate"(90)), they do contain an earnings criterion phrased as a presumptive test:

(b) Earnings at a monthly rate in excess of \$100. An individual's earnings from work activities averaging in excess of \$100 a month shall be deemed to demonstrate his ability to engage in substantial gainful activity in the absence of evidence to the contrary.(91)

Congress made two changes in the early 1960's to liberalize eligibility: one (eliminating the age-50 minimum(92)) reduced transparency, the other (substituting "12 months" for "indefinite duration"(93)) enhanced it. By the late 1960's, however, the tide had turned. Alarmed at the steadily rising costs of DI, Congress rewrote the disability definition in 1967 in an effort to tighten the "substantial gainful activity" and "physical or mental impairment" tests.(94) SSA responded with a complete overhaul of its regulations.(95) While they made some modifications to the "gainful activity" and "work test" provisions, the criteria for determining SGA remained clouded in imprecise verbiage.

The 1968 rules' major contribution to transparency was the introduction of the "medical appendix."(96) The medical appendix differed from the 1961 version in three crucial respects. First, it was far longer (by a factor of three) and more detailed. Second, it relied far more extensively on objective measures of bodily function. (The visual acuity section, for example, contained a table and chart for measuring loss of visual function in precise mathematical terms based on specified testing

89. 20 C.F.R. §404.1533 (1962).

90. 20 C.F.R. §404.1532(c) (1962).

91. 20 C.F.R. §404.1534 (1962).

92. Pub.L. 86-778 (1960).

93. Pub.L. 89-97 (1965).

94. Pub. L. 90-248, 81 Stat. 869 (1967).

95. 33 Fed. Reg. 11749 (1968).

96. 20 C.F.R. §404.1539 Appendix (1969).

procedures.)⁽⁹⁷⁾ Third, and most important, the Appendix, rather than simply describing criteria for assessing relative severity, defined threshold impairment levels that would constitute presumptive evidence of disability. The medical appendix thus represents a huge step in the direction of an objective test for disability. Amendments to the Appendix since 1968 have pushed even further in that direction.

Despite this objectification of PMI criteria, the SGA test and its relationship to PMI remained obscured in much more open-textured language. Another massive overhaul of the rules in 1978 attempted to change that.⁽⁹⁸⁾ The 1978 amendments made two principal contributions: the "sequential evaluation" rule and the "grid."

The "sequential evaluation" rule⁽⁹⁹⁾ codified an approach for integrating medical and vocational factors that had evolved over the previous decade. This approach takes the form of a step-wise decision rule in which the disability decision is determined by the answers to a sequence of questions:

1. Has the applicant engaged in SGA during the period of alleged disability; (If so, he is not disabled.)
2. Does the applicant have a "severe" impairment? (If not, he is not disabled.)
3. Does the applicant have an impairment that meets the duration requirement and meets or equals the severity levels described in the medical appendix? (If so, he is disabled.)
4. Does the applicant's impairment preclude him from performing "past relevant work"? (If not, he is not disabled.)
5. Do the applicant's residual functional capacity and vocational capabilities permit him to perform a "significant number of jobs in the national economy"? (If so, he is not disabled.)

97. Id. Appendix §2.09.

98. 43 Fed. Reg. 55349 (1978).

99. 20 C.F.R. §404.1503 (1979).

The decision rule is thus a group of per se subrules hierarchically arranged. At each level, one asks a yes-no question, one of whose answers disposes of the case, while the other answer forces inquiry to the next lower level. At the first four levels, the outcome is determined by a single factor (actual SGA, "severity" of impairment, "past relevant work"). Only at the fifth and last must the decisionmaker determine how to integrate the medical and vocational factors. Guiding that decision is the function of the 1978 rule's other major innovation -- the "medical-vocational grid." (100)

The "grid" is a four-dimensional matrix that defines the relationship among four medical-vocational variables (the claimant's "exertional capabilities," "education," "age," and "previous work experience"). The rules define a small number of possible values that each of these variables can take. For example, there are four "age" categories ("advanced," "closely approaching advanced," "younger (45-49)," and "younger (18-44)") and three "experience" values ("unskilled or none," "skilled or semiskilled--skills not transferable," and "skilled or semiskilled--skills transferable"). Finally, the grid specifies the decision ("disabled " or "not disabled") associated with most combinations of these variables.

In principle, at least, the grid is simple to use. The decisionmaker first classifies the applicant into the appropriate category under each of the four medical-vocational headings. He then selects the table appropriate to the applicant's residual functional capacity, reads down the "age," "education," and "experience" columns to find the appropriate values, and reads the corresponding entry in the "decision" column.

The evolution of the disability insurance eligibility standards has thus followed a relentless progression toward increased transparency and complexity. Hard quantitative measures have replaced soft, judgmental adjectives. Absolute thresholds have been established for continuous variables. Balancing operations have yielded to a hierarchy of on-off levers. Yet, if the rule contains many more hard edges than before, it still contains many soft ones as well. Like a prime steak, it is marbled with discretionary judgments, such as the threshold "severity of impairment" determination, (101) or the "equivalency" assessment for impairments not precisely described in the medical

100. 20 C.F.R. Subpart P, Appendix 2 (1979).

101. 20 C.F.R. §404.1503(c) (1981).

appendix,(102) or the classification of a claimants' "residual functional capacity."(103) Yet despite these very considerable residual pockets of discretion, there can be little doubt that, over a very great range of its effective operation, the rule has been rendered far more transparent for its users. At the same time, however, the rule has grown immensely more complex. The disability criteria now fill 64 pages of the Code of Federal Regulations and many thousands more in administrative instructions, bulletins, interpretations and precedents. Their application, moreover, often requires complex or expensive tests, examinations, or measurements.

The factor most obviously responsible for this trend is transaction costs.(104) The volume of determinations is immense and until quite recently was growing at a rapid rate. Even as the number of initial claims has leveled off, the number of demands for reconsideration, hearings, and appeals has continued to grow unabated, as the following table indicates.

102. Id. §404.1503(d).

103. Id. §404.1505.

104. Since the rule are intended solely to characterize a status resulting from an unexpected and presumably unwanted cause, their evaluation cannot plausibly be related to any compliance-related goals. Their only significant possible behavioral objective would be to discourage malingerers from filing claims, an effect that would be reflected in a direction of transaction costs.

DI CASES PROCESSED
BY LEVEL (FY 1976 and FY 1980)(105)

	Number of Decisions (in 000's)	
	FY 1976	FY 1980
Initial Determinations	1236.8	1038.9
Denials	754.8	696.1
Denial rate	61%	67%
Reconsiderations	223.0	311.7
Denials	169.6	265.0
Denial rate	76%	85%
ALJ Decisions	110.4	172.5
Denials	59.9	72.5
Denial rate	54%	42%
Appeals Council Decisions	27.8	37.6
Denials	26.2	32.7
Denial rate	94%	87%
Judicial Decisions	4.5	6.7
Denials	3.8	3.2
Denial rate	84%	48%

Although the estimated cost per claim of processing all DI claims is quite modest (\$171 in 1978(106)), the cost per contested claim is a good deal higher.(107) Further, even at \$171 per claim, the total cost of the 1.2 million claims processed in 1978 amounts to \$205 million.

-
105. Sources: Status of the DI Program, supra note 80 at 18, 31; Admin. Conference of the U.S., Federal Administrative Law Judge Hearings, Stat. Rep. for 1976-1978 at 321-24 (1980); 1977 SSA Ann. Rep. 19. Data for reconsiderations and all subsequent steps include continuing disability investigations as well as review of initial determinations.
106. 1978 SSA Year in Review: Administration of Social Security Programs 12.
107. One study estimated the cost per hearing at \$500 to \$1000. Mashaw et al., supra note 77, at 15.

Raw numbers like these do not, however, do full justice to the power of the transaction cost factor. One of the major "hidden" transactional costs in a benefits system is the impact of delay on deserving applicants. The 480 thousand applicants who received a favorable decision at the initial application stage in 1976, for example, had to wait an average of 110 days for the award.(108) The 50 thousand who prevailed after an ALJ hearing had to wait an average of 249 days.(109) The human cost, in terms of anxiety and deprivation, represented by such delays is obviously enormous.

A second hidden transactional cost is the difficulty of controlling subordinate decisionmakers. A substantial degree of de facto decentralization is unavoidable in so enormous an operation. But the structure of the DI program pursues decentralization with a vengeance. Initial decisions (and what amount to final decisions in the 85 percent of cases not appealed to SSA) are made by officers of 50 autonomous state agencies subject to only indirect supervision by SSA. These agencies are themselves often administratively decentralized and often rely heavily on consulting physicians and vocational experts. Within SSA, decisions are made by a cadre of some 700 often fiercely independent ALJS who preside at hearings with no representative of SSA usually present.(110) Any decisionmaking apparatus so fragmented--especially one whose decisions commit the expenditure of such vast sums of money and have a capacity to salve so much human suffering -- cries out for tight centralized control. Recent studies documenting high levels of apparent inconsistency among states or ALJS have further fueled these pressures.(111)

Demands for central control naturally focus attention on the clarity of substantive standards. The utility of conventional management control devices like reporting systems, performance appraisal, and quality review -- and SSA has developed them all to a refined art(112)--ultimately depend on the clarity of the

108. 1977 SSA Ann. Rep. 23. The 480,000 figure was computed from data in the table at note 105 supra.

109. Id. at 52.

110. Admin. Conference of the U.S., supra note 105, at 21.

111. See e.g., 1976 GAO Study; SSA Consistency of Initial Disability Determinations 1, 12 (1980).

112. SSA's quality control system is described in Chassman & Ralston, Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process, 65 Cornell L. Rev. 801 (1980).

underlying standards to be applied.(113) It is one thing to document inconsistency of result (by, for example, comparing two individuals' resolution of a hypothetical case). But it is very difficult to remedy that inconsistency without having clear decisional criteria. Without the dramatic increase in regulatory objectivity, SSA's massive quality control program -- and its impressive gains, as measured at least by quantitative productivity(114) --would be almost unthinkable.

Such extreme transparency is usually bought at a high price, paid in the currency of incongruity or ex ante rulemaking costs. To take the latter first, the development of SSA's elaborate scheme has indeed been costly. The development costs probably measure in the hundreds of millions. But failure to develop generic criteria would merely postpone, not avoid, rulemaking costs. The administration of this program has always demanded a high level of justification for individual decisions. Disappointed recipients are entitled to explanations of increasing thoroughness and coherence at successive levels. Formal hearing procedures (at the ALJ stage) and searching judicial review have conspired to maintain a particularly rigorous justificatory on those who would deny claims at the appellate stage. A claims-processing system as legalistic as this one will reward a very heavy initial investment in a priori rulemaking, by reducing the cost of meeting its subsequent explanatory obligation.

The incongruity argument is more troublesome. The current rules undoubtedly miss their target quite frequently.(115) Automatic disqualification of claimants engaged in gainful work

-
113. See R. Dixon, Social Security Disability and Mass Justice 51 (1973).
114. For example, processing time has dropped steadily in recent years. The mean time for initial awards dropped from 110 days in 1976 to 85 days in 1978. 1978 Year In Review supra note 106, at 12. Mean processing time for ALJ hearings fell from 249 days in 1976 to 145 days in 1979. 1979 SSA Ann. Rep. The "productivity index," SSA's overall measure of productivity in processing DI cases, increased from 100 in 1967 to 145 in 1976. 1978 Year In Review, supra note 106, at v.
115. For example, see Goldhammer, The Effect of the New Vocational Regulations on Social Security and Supplemental Security Income Disability Claims, 32 Ad. L. Rev. 501, 502-03 (1980).

must, by penalizing even superhuman efforts to overcome adversity, produce unjust results in some cases.(116) An automatic finding of disability for every condition in the medical appendix must at least occasionally discourage productive activity. Can it be true, as the grid tells us,(117) that no person in his late 40's who is unskilled, uneducated, and limited to sedentary work, can be "disabled"?

But to imagine horribles is not to estimate the weight they should exert on the choice of standard. The true cost of misclassifying a case depends on how close the case is to the "disabled"/"not disabled" boundary.(118) A regime that misclassifies 100,000 healthy malingerers or immobile quadriplegics is far more costly to society than one that misclassifies 100,000 persons with severely limited but partial function. The latter, if granted benefits, will forgo only limited productive effort, and, if denied, have some hope for independent support. The relevant question then becomes whether the unavoidable incongruities of a hard-edged rule cluster near the boundary, or near the extremes. Mashaw concludes that, under SSA's current regime, they cluster near the boundary,(119) and I agree. The step-wise decision rule starts at the extremes and moves toward the middle, knocking off most of the easy cases first, and reserving deeper and broader scrutiny for the closer cases. Intuitively, at least, the medical and vocational exhibit seems to embrace within the company of the disabled the most deserving cases. On this admittedly impressionistic level, then, the SSA rules seem to hold congruity costs within tolerable limits.

This brings us back one last time to transaction costs, however, since the rules achieve that result (if they do) only at the cost of enormous complexity. Does not the sheer number of decisional steps make up, in added fact-finding and interpretive efforts, for the savings effected by increasing the transparency

-
116. See Liebman, The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of the Welfare Estates, 89 Harv.L.Rev. 832 (1976).
 117. 20 C.F.R. Subpart P, Appendix 2, §201.17 (1981).
 118. See Mashaw, How Much of What Quality: A Comment on Conscientious Procedural Design, 65 Cornell L. Rev. 823 (1980).
 119. Mashaw, Administrative Due Process as Social-Cost Accounting, 9 Hofstra L. Rev. 1423, 1441 (1981).

of each? The answer here seems to be no. Most of the fact-gathering costs involved in the medical and vocational assessment would be incurred even under a far simpler standard. And since most cases raise only a few contestable issues, the overall complexity of the rules is less weighty than the accessibility and clarity of their relevant features. In these latter respects, SSA's rules receive a high score.

C. INS Change-of-Status Determinations

Section 245 of the Immigration and Nationality Act authorizes the Attorney General, "in his discretion and under such regulations as he may prescribe," to adjust the status of certain aliens to that of "an alien lawfully admitted for permanent residence." (120) The traditional channel for immigration to the United States is application to the American consul in the applicant's native country. (121) At one time, aliens present in the United States on a nonimmigrant visa (such as students or tourists) who wished to remain here permanently had to return to their native land to obtain an immigrant visa from the U.S. Consul, even if they were immediately eligible for such a visa. (122) The administrative creation of a special procedure for pre-examining applicants and routing them through American consular offices in Canada eased this burden somewhat. In 1952, Congress enacted Section 245 in order to eliminate even this unnecessary step. (123)

In order to qualify for adjustment of status, the applicant must meet several threshold statutory criteria: (124)

-
120. 8 U.S.C. § 1255(a) (1980).
121. See 8 U.S.C. §§ 1101(a)(16), 1201 (1980).
122. See Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 *J. of Legal Studies* 349, 350-51 (1972).
123. *Immigration and Nationality Act of 1952, c.477, Title II, ch. 5, § 245, 66 Stat. 217.* In fact, the pre-examination procedure continued to be used until 1958 in "hardship" cases not covered by section 245. See Mailman, *Move to Liberalize Adjustment of Status*, 184 *N.Y.L.J.* 1, 3 (Aug. 5, 1980).
124. 8 U.S.C. § 1755(a)(i) (1980).

1. The applicant must have been "inspected and admitted or paroled into the United States;"
2. The applicant must be "eligible to receive an immigrant visa and (be) admissible to the United States for permanent residence" under applicable quotas and preferences; and
3. The applicant may not be a "crewman," may not have accepted "unauthorized employment prior to filing an application," and may not have been "admitted in transit without visa."

All of these criteria are either facially transparent or reasonably fully articulated by a history of interpretation.

What is neither transparent nor nearly as well articulated is the additional "discretionary" element of the determination. In delegating his authority to the Immigration and Naturalization Service (INS), the Attorney General made no effort to relieve the opacity of the statute's "discretionary" residue.⁽¹²⁵⁾ The INS, in turn, has taken only very modest steps in that direction. The Service's published regulations under Section 245 are utterly silent with regard to extra-statutory criteria for the exercise of discretion.⁽¹²⁶⁾ The Operating Instructions to District Directors contain only one explicit statement of criteria beyond the statutory minima:

When the evidence establishes that the alien obtained his non-immigrant visa to evade the normal immigrant visa process and there are no substantial equities present in his case, the application should be denied in the exercise of discretion. Substantial equities are considered to exist in a case if the facts are such that the alien would be granted voluntary departure until he

125. 8 C.F.R. § 2.1 (1981).

126. 8 C.F.R. Part 245 (1981).

is invited to appear at an American consulate to apply for an immigrant visa; in such a case, the application should not be denied in the exercise of discretion.(127)

For further elucidation of the Service's discretionary criteria, one must look to the published decisions of INS District Directors and the Board of Immigration Appeals (BIA). Various students of immigration law have been able to discern at least some revealing patterns in their body of precedent.(128) For example, they have identified certain circumstances that the Service regards as "adverse factors" (such as a preconceived intent to seek permanent residence at the time of entry; misrepresentations made in the application; petty criminal conduct; illegal employment; and so on). "Equities" cited in support of an application, on the other hand, include such factors as a bona fide marriage and viable marital relation, substantial difficulties in resettling or returning to one's native land, and candor in dealing with the Service.

Beyond this unofficial and nonexclusive recitation of favorable and unfavorable factors, however, it is difficult to go. The BIA has at least clarified earlier doubts about the de facto burden of proof: in the absence of adverse factors, the

127. INS Operating Instructions § 245.3b, reprinted in C. Gordon & H. Rosenfield, 4 Immigration Law & Procedure 23-522 (1981). "Voluntary departure" refers to a process by which the service may give a deportable alien a grace period within which to leave the country "voluntarily" prior to forcible expulsion. See 8 U.S.C. § 1252(b)(1980); Roberts, The Exercise of Administrative Discretion Under the Immigration Laws, 13 San Diego L. Rev. 144, 150 (1975). The incorporation by reference of the voluntary departure standards adds little to the transparency of the status-adjustment standards since most regulatory criteria for indefinite voluntary departure either duplicate status-adjustment eligibility criteria (e.g. admissibility or visa availability) or are themselves hopelessly opaque (e.g. "compelling factors warranting grant of voluntary departure"). See INS Operating Instructions § 242.10.
128. See, e.g., C. Gordon & H. Rosenfield, supra note 127, at 7-19; Orlow, Adjustment of Status to Lawful Permanent Resident, in Tenth Annual Immigration and Naturalization Institute 151, 156-68 (A. Fragomen, Jr., ed. 1979).

application will usually be granted.(129) But the relative weights to be assigned to various factors, or even the criteria used to identify a circumstance as "adverse" or as an "equity," remain unspecified.

The Service has been criticized on numerous occasions for the relative opacity of its status adjustment standards. Professor Abraham Sofaer, for example, in a 1972 study sponsored by the Administrative Conference, presented rather compelling statistical and anecdotal evidence of inconsistency in the Service's exercise of discretionary authority.(130) Discretionary denials, he observed, were considerably more susceptible to political intervention and administrative reversal than denials based on the much more explicit statutory criteria.(131) While most courts have upheld Section 245's grant of discretionary power to the Attorney General (and its subdelegation to the INS),(132) a few judges have displayed unease at its breadth. Dissenting in Ameeriar v. INS, Judge Freedman of the Third Circuit characterized the Service's exercise of discretion as "an utterly unguided and unpredictable undertaking":

Only the inevitable necessity of disposing of the case is specified, like a result without a cause. What is the desired goal and what guides should channel the course to it receive no recognition.(133)

In 1979 the Service made an effort to increase the transparency of its standards for granting status adjustments. An internal task force, chaired by the Associate Commissioner for Examinations, identified a number of areas in which the Service exercised broad discretion and developed proposed criteria for each. The project culminated in a notice of proposed rulemaking

129. Matter of Arai, 13 I. & N. Dec. 494 (1970).

130. Sofaer, supra note 122, at 365-93.

131. Id. at 385-93.

132. E.g., Faddah v. INS, 580 F.2d 132 (5th Cir. 1978); Marino v. INS, 537 F.2d 686 (2d Cir. 1973); Ameeriar v. INS, 438 F.2d 1028 (3d Cir. 1971).

133. 438 F.2d at 1042.

issued on June 21, 1979.(134) The stated purpose of the rule was "to assure that all applicants and petitioners receive fair and equal treatment before the Service."(135) The portion of the proposed rule dealing with status adjustment listed five adverse and five favorable factors, required adjustment in the absence of adverse factors, and stated a strong presumption against adjusting the status of any alien who had evaded the normal immigration process (absent "substantial equities").(136)

One might be tempted to dismiss these proposed rules as a mere codification of existing practice. Even to the extent that this is true, however, they make more visible and mandatory what had theretofore been largely suggestive or implicit. Furthermore, the proposed rules did go beyond previous precedent in some respects--for example, by making mandatory the presumption in favor of adjustment in the absence of adverse factors.(137) A more serious objection is the large pockets of opacity retained in the new formulation. Many of the factors listed are couched in vague language,(138) their enumeration is nonexclusive, and their relative weights are unspecified. At most, the proposed rule promised to provide little more articulation than the Service's elusive and inconclusive body of instructions and precedents.

Yet even this modest degree of policy clarification was too much for the INS. In a terse order issued on January 21, 1981, the INS announced its decision to cancel the proposed rule. Its only stated reason for abandoning the effort was:

[I]t is impossible to foresee and enumerate all the favorable or adverse factors which may be relevant and should be considered in the exercise of administrative discretion. Listing some factors, even with the caveat that such list is not all inclusive, poses a danger that use of guidelines may become so rigid as to amount to an abuse of discretion.

134. 44 Fed. Reg. 36187 (1979).

135. Id.

136. Id. at 36191 (proposing 8 C.F.R. § 245.8).

137. Matter of Arai, 13 I. & N. Dec. 494 (1970).

138. E.g., "adverse foreign relations impact" (adverse factor) or "need for services in the United States" (favorable factor). 46 Fed. Reg. 9119 (1981).

In the exercise of discretion, all relevant factors are considered. The adverse factors are weighed against the favorable factors in the judgment and conscience of the responsible officials. Service officials are required to prepare a record justifying their actions when they deny a benefit in the exercise of administrative discretion. Summary and stereotyped denials are not acceptable.(139)

The Service is, at least, consistent. Its explanations are no more transparent than its rules. In order to explain the mission's abortion, we must look behind the official explanation. An objection registered by several INS district officials was a fear of increased litigation. One particularly colorful comment predicted, for example, that:

[T]he proposals embodied in this draft would subject the Service to a constant barrage of spurious appeal by Immigration attorneys on the basis of the semantics proposed to be injected into the regulations. They subvert Government to the vagaries of attorney dilatory tactics and would appear to tie our hands completely in the cobwebs of endless liturgical [sic?] dialogue.(140)

It is hard to take such an assertion seriously. If anything, the transaction cost factor cuts in precisely the opposite direction. The sheer volume of status-adjustment cases is staggering:(141)

<u>Fiscal Year</u>	<u>Applications</u>	<u>Adjustments</u>
1976	70,000	47,947
1977	90,450	54,523
1978	N.A.	101,397

139. Id.

140. Memorandum from [name and position deleted], INS, to Lionel J. Castillo, Commissioner, INS, Sept. 12, 1978, p. 1.

141. INS, 1978 Stat. Yearbook.

Most individual applicants, moreover, have a sufficiently intense interest in the outcome of these cases to expend considerable effort on the process.(142) The Sofaer study showed that in the vast majority of cases (estimated at over 90 percent), a disappointed applicant seeks and obtains subsequent relief or forces the Service to take expensive enforcement action.(143) As a consequence, Professor Sofaer regarded the potential payoff from clearer rules, in terms of lower transaction costs, to be substantial.(144)

Enhanced clarity would, of course, entail additional ex ante rulemaking costs. But that investment would probably be repaid by the reduced explanatory burden imposed on individual INS adjudicators. The INS Operating Instructions require that discretionary denials not governed by applicable precedent be accompanied by a "full discussion of the favorable and unfavorable factors" considered.(145) Clearer rules could ease the search for applicable "precedent" and shrink the residual category of decisions requiring elaborate ad hoc justification. Another form of ex post rulemaking in which the Service presently invests is the selection of precedents for publication. The Service publishes only about 100 of the thousands of status-adjustment decisions rendered each year by its district directors.(146) The

-
142. It is true that an alien whose application is denied for discretionary reasons can still apply for an immigrant visa at the American Consulate in his native land. But this option may entail considerable cost, including round trip transportation for the alien and his family, the delay, the risk of erroneous denial by the Consul, and in some cases exposure to military service or imprisonment at home.
143. Sofaer, supra note 122, at 396-97.
144. Id. at 421. The volume of adjustments has grown since the time of Sofaer's study (41,528 adjustments in 1970). Id. at 353. This is balanced, however, by a decline in the proportion of discretionary (as opposed to statutory) denials. Compare id. at 365 (35% of denials discretionary in 1970), with Orlow, supra note 128, at 157 (discretionary denials "rare" in 1979).
145. INS Operating Instructions § 245.5d(2), reprinted in C. Gordon & H. Rosenfield, supra note 127, at 23-533 to -534.
146. Interview with Paul Schmidt, Acting General Counsel, INS, Washington, D.C., December 17, 1980.

very act of selection constitutes a form of rulemaking that could be at least partially displaced by issuing clearer ex ante guidelines.

Clearer rules could achieve additional transactional savings for the agency by facilitating internal quality control. The decisionmaking process in status adjustment cases is--almost unavoidably--quite decentralized. In most cases,(147) initial decisions are rendered by relatively low-salaried officials called "Immigration Examiners" assigned to the Service's 36 district offices.(148) To control the work product of this far-flung legion of adjudicators, the INS relies primarily on two devices. The weaker instrument is an exhortation in its Operating Instructions that decisionmakers stay abreast of the selected precedents periodically published by the agency.(149) The stronger control is the system of hierarchical review.

All discretionary denials and any discretionary approvals in cases involving adverse factors are subject to mandatory review by a superior district officer.(150) In fact, according to one former General Counsel, district directors personally review and issue all status adjustment decisions.(151) In addition, denied applicants may request review at the district level by way of a motion to reopen or to reconsider, and may obtain de novo redetermination of their application at a deportation

-
147. Nonimmigrant aliens may first apply for change of status at a deportation hearing. In that event, the initial determination is made by a Special Inquiry Officer ("immigration judge"). See C. Gordon & H. Rosenfield, supra note 127, at 7-23.
148. Sofaer, supra note 122, at 357, n.25. Most examiners are non-lawyers. Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 Colum. L. Rev. 1293, 1299 (1972).
149. INS Operating Instructions § 245.5d(1), reprinted in C. Gordon & H. Rosenfield, supra note 127, at 23-531.
150. INS Operating Instructions § 245.5d(3) & (4), id. at 23-532.
151. Letter from Charles Gordon, INS General Counsel, to James J. Orlow, Esq., February 25, 1972, at 1.

hearing.(152) Issuance of more transparent decision rules should enable the Service to reduce the extent to which it relies on this elaborate system of review as a quality assurance mechanism.

Compliance considerations may also argue for clearer rules in this context. Every year untold thousands of aliens seek residence in the United States by a variety of unlawful means. Ambiguous criteria for adjusting the status of nonimmigrant visitors could encourage would-be immigrants to evade the usual immigration channels. A critical determinant for assessing the weight of this factor is the extent of aliens' familiarity with immigration law. Clear standards have little compliance value if physical remoteness or cultural barriers block their communication to the intended audience. This condition may be especially prevalent in immigration law generally. Yet, it is less plausibly characteristic of status-adjustment standards than, say, admissibility standards, since the former's audience is at least physically present in the United States and has already "worked the system" to the extent necessary to obtain a non-immigrant visa. Since status adjustment is a privilege that an alien must affirmatively request, it is probably reasonable to assume at least a moderate level of familiarity with the governing standards. Also, the rate of representation at status-adjustment interviews is quite high.(153)

Even if the audience is knowledgeable, however, greater clarity may not have important compliance-inducing consequences. The main behavioral concern of the program is illegal or evasive entry. The statute addresses this problem explicitly by conditioning eligibility for status-adjustment on admissibility and immediate visa eligibility.(154) Those criteria are reasonably clear (and, in any event, are not the object of our immediate scrutiny). The residual "discretionary" judgment, on the other hand, may be designed not to induce any particular behaviors, but rather to recognize the existence of a condition or

152. See Orlow, supra note 128, at 165-167. Denial by an immigration judge (at the deportation stage) is appealable to the Board of Immigration Appeals and a Court of Appeals. Id. at 167.

153. Sofaer, supra note 122, at 359-60 (at least 44% of all applicants in sample had representatives; 60% of all aliens denied relief had representation).

154. 8 U.S.C. § 1255(a) (1980).

its absence. To the extent that this is true, the compliance-inducing function of rule clarity would simply drop out of the equation.

This last line of reasoning invites attention to the statute's purposes. That inquiry is also essential, of course, to weighing the potential costs of incongruence that might result from a clearer standard. The Service seemed to regard incongruity risks as the decisive argument against the 1979 proposal. Section 245, it seemed to be saying, does not merely permit, but requires the exercise of "discretion." But why? It is far from clear what Congress had in mind in adding the discretionary element. The statutory eligibility conditions seem to address the most obvious concerns (for example, excluding "misfits" or preventing an evasion of quotas). One can imagine three possible reasons for further limiting access to status adjustment: 1) to preserve the integrity of the normal immigration process by forbidding end runs; 2) to assure harmony between status-adjustment policy and our relations with a foreign country; or 3) to limit status adjustment to persons likely to make a particularly positive contribution to society. The first of these purposes surely lends itself to a reasonably transparent rule, and the second justifies at most a separate rule (or exception from the standard approach) for nationals of designated countries with whom our bilateral relations require a distinct policy.

The third hypothesized statutory objective provides a more plausible justification for resisting rule clarification. Assessing a person's prospective value to society, so the argument runs, is a holistic judgment that cannot be reduced to a formula. In the words of one INS official:

[T]he diversity of human activities tends to continually generate new factors and issues which should logically affect the exercise of discretion.(155)

At most, however, this argument demands the preservation of some open texture in the standards. An unweighted, nonexclusive list of factors, such as was proposed in 1979, surely leaves plenty of room for the play of conscience.

In rejecting even that modest effort at articulation, the Service seems to go beyond an apology for discretion by saying that discretion is a positive good, not simply an absence of law.

155. Memorandum from [name and position deleted], INS, to Lionel J. Castillo, Commissioner, INS, Sept. 15, 1978, at 1.

Perhaps the Service has in mind a notion akin to Professor Tribe's "structural due process" model(156) or Professor Mashaw's "moral judgment" model.(157) Central to these models is the injunction that, when making moral judgments about a person, the state must permit him to participate in the articulation of the very standards to be applied to his case. Reliance on an antecedent rule effectively precludes that participation.

At heart, this model rests on a theory of justice quite different from the utilitarian approach on which the present study is based, and this is not the place to argue their respective merits. But even on its own terms, it seems inapplicable to the present context. Status adjustment is not characteristically a contest of relative "deservedness" or a determination of "culpability."(158) Nor is it usually the focal point for a clash of fundamental values.(159) While outcomes occasionally turn on the applicant's moral character,(160) most of the reasons conventionally invoked for discretionary grant or denial surely lend themselves to greater clarification without offending the applicant's humanity.

D. Labor Certification of Immigrant Aliens

Federal immigration law has long contained provisions designed to protect domestic workers from the entry of aliens into the labor force. The Immigration and Nationality Act of 1952 permitted aliens to enter the country for the purpose of performing labor unless the Secretary of Labor determined that such entry would have an adverse effect on the domestic labor force.(161) So phrased, the Act effectively placed the burden on the Secretary to prevent entry (or on domestic workers to

-
156. Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L.L. Rev. 269 (1975).
157. Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 1981 Duke L.J. 181, 188-90.
158. Id. at 188-189.
159. Tribe, supra note 156.
160. E.g., *Matter of Francois*, 10 I. & N. Dec. 168 (1963).
161. Immigration and Nationality Act of 1952, § 214(a)(14), Pub. L. 82-414, 66 Stat. 153, codified as amended at 8 U.S.C. § 1182(a)(14)(1980).

challenge entry). During the period 1952-1965, such challenges were extremely rare.(162) Concerned about the virtually unrestricted entry of aliens into the workforce, Congress amended the Act in 1965 to shift the burden to the alien (or, as a practical matter, his prospective employer) to demonstrate an absence of adverse impact.(163) The present statute restricts entry by excluding:

Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.(164)

The substantive standard for certifiability (virtually unchanged since 1952) is a commendably transparent illustration of the legislative draftsman's art. To receive certification, the job opportunity must satisfy two independent conditions: 1) an insufficient number of domestic workers "able, willing, qualified, and available" for the job, and 2) no "adverse effect" on domestic workers' wages and working conditions. The draftsman even specified the time and location for testing availability.

The statute delegated to the Secretary of Labor the task of deciding how to ascertain availability and adverse impact in particular cases. The Secretary's initial reponse was to promulgate a rule establishing two "schedules" -- Schedule A, a short list of undersupplied occupations for which certification would be automatic, and Schedule B, a longer list of oversupplied

-
162. See Rodino, *The Impact of Immigration on the American Labor Market*, 27 Rutgers L. Rev. 245, 252-53 (1974).
163. Immigration and Nationality Act of 1965, Pub. L. 89-225, § 10, 79 Stat. 917.
164. 8 U.S.C. § 1182(a)(14)(1980).

occupations for which certification was precluded.(165) For job titles falling within these two lists, the Secretary's drafting technique was a paragon of transparency. For the far more numerous occupations not encompassed within the two schedules, however, the regulation merely tracked the statutory language.

Two years later (1967), the Secretary amended the rule to specify criteria for determining "adverse impact" on domestic workers' wages and working conditions.(166) A job offer would be deemed to have such an impact if the wage were below the prevailing wage for that occupation in the locality and if the working conditions were less favorable than those extended to domestic workers by the same employer. This rule included a highly detailed definition of "prevailing wage." For the next 10 years, the only amendments to the substantive standard involved Schedules A and B.(167) Aside from minor adjustments and refinements in the listed occupational categories, the most significant change was the relaxation of Schedule B's flat prohibition in 1971, by authorizing applicants for Schedule B jobs to seek a waiver in individual cases.(168) No criterion for waivers was specified. This transparency-reducing amendment reflected concern for the overinclusiveness of a flat nationwide prohibition.

In the meantime, the Department of Labor (DOL) provided no further guidance on how to ascertain the "availability" of workers in unscheduled occupations except 14 pages of "Guidelines" and various supplementary memoranda issued by the Manpower Administration to its regional offices and to state job

-
165. 30 Fed. Reg. 14979 (1965), codified as amended at 20 C.F.R. §§ 656.10-.11 (1981).
166. 32 Fed. Reg. 10932 (1967).
167. See 31 Fed. Reg. 16412 (1966); 33 Fed. Reg. 12808 (1968); 36 Fed. Reg. 2462 (1971).
168. 36 Fed. Reg. 2462 (1971), codified as amended at 20 C.F.R. §§ 656.11(c), 656.23(d)(1981).

service agencies.(169) These materials specified, among other things, that general labor market data for the locality in question should be utilized to test domestic worker "availability." Using this method, regional offices denied certification in roughly one of every two cases.(170)

The failure of the Department to publish its criteria for testing "availability" resulted in public criticism of the agency for relying on "secret" policy.(171) The Manpower Administration did issue a revised field memorandum in 1973,(172) but criticism of the agency's lack of published criteria continued to mount.(173) A growing number of reviewing courts, moreover, found the aggregate labor market test an inadequate basis to establish domestic workers' availability.(174)

The Department completely overhauled its rules in 1977,(175) establishing a new method to test worker availability -- individual recruitment efforts by the prospective employer. The

-
169. Administrative Conference of the U.S., Recommendation No. 73-2, 38 Fed. Reg. 16840 (1973).
170. Id. (60,000 applications received in 1972; 30,000 denied).
171. Wasserman, The Labor Certification Program, Its Deficiencies and Appellate Review, 49 Interpreter Releases 161, 162 (1972). See also Administrative Conference of the U.S., supra note 169; H.R. Rep. No. 93-461, 93d Cong. 2d Sess. (1973).
172. Manpower Admin., U.S. D.O.L., Field Memorandum No. 378-73 (Dec. 3, 1973), described in Rubin & Mancini, An Overview of the Labor Certification Requirement for Intending Immigrants, 14 San Diego L. Rev. 76, 87 (1976).
173. See, e.g., Gordon, The Need to Modernize Our Immigration Laws, 13 San Diego L. Rev. 1, 11 (1975); Comptroller General, House Comm. on the Judiciary, Administration of the Alien Labor Certification Program Should be Strengthened 23 (May 16, 1975); ABA, Section of Admin. Law, Comm. on Immigration & Nationality, Report and Recommendations (May 1976).
174. E.g., Seo v. United States Dept. of Labor, 623 F.2d 10 (9th Cir. 1975); Shuk Yee Chan v. RMA, 521 F.2d 592 (7th Cir. 1975); Digilab, Inc. v. Secretary of Labor, 495 F.2d 323 (1st Cir.), cert. denied, 419 U.S. 840 (1974).
175. 42 Fed. Reg. 3441 (1977).

rules specified in considerable detail the steps that an employer had to take to demonstrate an adequate market test (for example, general advertising, posting of a job notice in the workplace, listing the job with the local state job service agency).(176) Satisfaction of these recruitment requirements was a necessary (but not a sufficient) condition for certification. The regional certifying officer still had to find that the statutory criteria were satisfied.(177) As a practical matter, however, satisfaction of the recruitment procedures has generally been treated as sufficient evidence of domestic worker unavailability.

The painstaking detail of the 1977 rules generated somewhat contradictory pressures for further reform. On the one hand, the new provisions, despite their apparent high transparency, raised many new questions of interpretation at the margins. For example, for how long and where in the workplace must the employer post the required job notice?(178) Does the ban on unduly restrictive "requirements"(179) in the job advertisement (for example, "ability to speak Spanish required") also include "preferences" ("ability to speak Spanish preferred")? On the other hand, the 1977 rules were criticized by employers and some DOL officials as excessively rigid, often forcing employers to suffer needless expense and delay to establish domestic worker unavailability.(180) In the words of a recent program director, the 1977 rules "eliminated the discretion that was needed to do the right thing".(181)

176. 20 C.F.R. §§ 656.21(b), (g)(1981).

177. 20 C.F.R. § 656.24(b)(2) (1981).

178. See 20 C.F.R. § 656.21(b)(10)(1981).

179. See 20 C.F.R. § 656.21(b)(8)(1981).

180. See Booz, Allen & Hamilton, Inc., Study of the Permanent Labor Certification Program Administered by the U.S. Department of Labor and State Employment Security Agencies at I-4 (Sept. 1980) [hereinafter cited as Booz Allen study].

181. Interview with Aaron Bodin, Chief, Division of Labor Certifications, U.S. Employment and Training Admin., DOL, Washington, D.C., December 16, 1980.

These twin pressures spawned a further overhaul of the rules in 1980.(182) Most of the 1980 amendments provided further elaboration of earlier language. For example, the external advertising requirement was rewritten to specify the timing, duration, and type of media to be used.(183) Similarly, the amended "internal posting" rule now requires the employer to post a "clearly visible and unobstructed" notice in a "conspicuous place" for at least "ten consecutive days."(184) An amusing comment in the preface to the 1980 rules reveals that, despite this penchant for precision, the Department does have its limits:

A number of State job service agencies and ETA regional offices requested that the minimum size be specified for a posted notice. DOL has determined not to regulate the size of the notice with such specificity.(185)

While most of the amendments increased the complexity and transparency of the labor certification rules, the 1980 revision did contain two provisions designed to relax the rule's rigidity. One authorizes certifying officers to "reduce the employer's recruitment efforts" required by the existing rules "if the employer satisfactorily documents that the employer has adequately tested the labor market with no success at least at the prevailing wage and working conditions."(186) The second authorizes certifying officers to excuse "harmless error" in the employer's failure to comply with the rule's detailed recruitment procedures, but only if "the labor market has been tested sufficiently to warrant a finding of unavailability and lack of adverse effect."(187)

Despite these rather tentative efforts at "defixing" the rules, the labor certification rules have evolved to a state of high complexity and transparency. One plausible explanation for

182. 45 Fed. Reg. 83928 (1980).

183. See 20 C.F.R. § 656.21(g) (1981).

184. See 20 C.F.R. § 656.21(b)(3) (1981).

185. 45 Fed. Reg. 83930 (1980). "ETA" is the Employment and Training Administration.

186. 20 C.F.R. § 656.21(i) (1981).

187. 20 C.F.R. § 656.24(b)(1) (1981).

this is the relative significance of transaction costs in this program. The volume of cases is quite large (54,000 in 1979).(188) The time and effort expended in processing so large a caseload is surely an important consideration in the design of the substantive rules. The 1977 rules appear to have had only mixed success, however, in reducing processing costs. It is true that the number of applications fell (from 60,000 to 50,000 per year) after 1977.(189) At the same time, the certification rate rose (from 65 to 90 percent).(190) This suggests that the increased clarity of the rules did discourage more nonmeritorious applications. But, the time (in both chronological and person-hour terms) required to process cases rose after 1977.(191) This appears to be attributable partly to the rules' substantive shift (from an aggregate labor market test to individualized recruitment) and partly to their increased complexity. Decisionmakers must now ascertain compliance with a larger number of specific requirements. A contributing factor is the increase in the percentage of employers represented by attorneys after 1977.(192) In addition to the increase in transaction costs inherent in the greater use of attorneys, attorneys tend to exploit more effectively the unavoidable ambiguities of rules, thereby prolonging the decisional process.

A second form of transaction cost is the cost of maintaining internal quality control. The program is administered in a decentralized fashion.(193) Applications are initially processed by the state job service agencies (units within federally supported employment security agencies). All but two states further decentralize this processing function to their local or regional offices.(194) After preparing the files, the state agencies transmit them to "certifying officers" in the ten DOL regional offices who make the actual determinations.

-
188. Booz Allen Study, supra note 180, at iii.
189. See Rubin & Mancini, supra note 172, at 78.
190. Booz Allen Study, supra note 180, at IV-10.
191. Bodin interview, supra note 181.
192. Id.
193. For a description of the process, see Rubin & Mancini, supra note 172, at 81-89; Booz Allen Study, supra note 180, chs. II-III.
194. Booz Allen Study, supra note 180, at II-3.

The difficulty of maintaining consistency in so geographically and jurisdictionally far-flung an empire strongly recommends the use of bright-line standards. By this measure, the 1977 rules were reasonably successful. Although a 1980 study commissioned by DOL (the Booz Allen study) found "considerable diversity in labor certification operations among state Job Service agencies" and "to a lesser extent" among DOL regional offices, it concluded that "the overall implications of this diversity are . . . small."(195) Nonetheless, it was concern about this diversity that obviously animated many of the 1980 amendments. Indeed much of the pressure for further clarification and opposition to rule relaxation came from the state and regional officials charged with administering the program.(196)

Compliance problems are also likely to be especially acute in a program of this sort. Both aliens and employers often have strong motivation to violate the law (for the alien, to obtain employment and the means to remain in the country; for the employer, to obtain cheap labor). The regulated activity, moreover, is highly dispersed and inconspicuous (although domestic workers and their unions can often be counted on to alert DOL to violations). These factors provide an additional incentive for objectifying the governing criteria. The success of the 1977 rules in achieving this objective is difficult to judge since DOL lacks reliable data on the overall rate of compliance, but the hypothesis seems plausible.(197)

Whatever gains the 1977 rules have achieved in reducing transaction costs and increasing compliance must be balanced against the evidence of their over- and underinclusiveness. Concern about overinclusiveness (excessive employer recruitment requirements) motivated the "recruitment reduction" and "harmless error" amendments.(198) Perhaps even weightier are the apparent underinclusiveness losses of certifications incorrectly issued. The Booz Allen study concluded that the 1977 rules "do not ensure that an effective test of the labor market is made."(199)

195. Id. at ii.

196. See, e.g., 45 Fed. Reg. 83930-32 (1980).

197. The Booz Allen Study concluded that the process established by the 1977 rules "probably deters a number of applicants who realize they could not meet the requirements." Booz Allen Study, supra note 180, at vi.

198. See notes 188-187 supra.

199. Booz Allen Study, supra note 180, at IV-5.

Although the required recruitment process effectively exposes domestic workers to the jobs for which certification is sought, domestic workers are almost never hired in preference to the applicant alien. The evidence strongly suggests that many employers are merely going through the motions without seriously considering hiring the domestic applicants produced by the procedure.(200)

On the surface, it is hard to blame the rule itself for this condition, since it specifically forbids certification to an employer who has rejected a domestic worker's application for any reason other than a "lawful job-related" reason.(201) This provision represents a softening of the Department's previous (albeit unpublished) hard-edged policy of presuming domestic worker availability for a particular job based on aggregate labor market data. Several courts had sharply criticized that policy as excessively overinclusive.(202) But the attempt in 1977 to substitute a more individualized test of worker availability has apparently succeeded only in replacing overinclusiveness errors with underinclusiveness errors. The reason offered in the Booz Allen study is transaction costs. Certifying officers, the study concluded, find it "time consuming and difficult" to challenge employers' justifications for rejecting domestic applicants.(203) Under caseload pressures, in other words, even facially congruent opaque formulations can produce substantial incongruities.

The social cost of this underinclusiveness may not be especially great, however. Schedule B excludes aliens (unless they can obtain a waiver) from low-skilled occupations for which domestic demand is likely to be sufficient. The Booz Allen study found, moreover, that the certification process effectively protects domestic workers' wage rates.(204) Finally, the

200. Id.

201. 20 C.F.R. § 656.21(b)(15)(1981).

202. E.g., Ratnayake v. Mack, 499 F.2d 1207 (8th Cir. 1974); Digilab, Inc. v. Secretary of Labor, 495 F.2d 323 (1st Cir.), cert. denied 419 U.S. 840 (1974); Reddy, Inc. v. Department of Labor, 492 F.2d 538 (5th Cir. 1974). Contra, Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir.), cert. denied, 95 S.Ct. 525 (1974).

203. Booz Allen Study, supra note 180, at IV-13.

204. Id. at ii.

extensive recruitment effort demanded by the 1977 amendments undoubtedly deters many employers from abusing the system. The cases that slip through the net, then, are likely to be the least serious in their impact on domestic employment.

The evolution of the labor certification rules is an object lesson in the dynamics of regulatory precision. In particular, it reveals the elusiveness of rule transparency. The original job schedules were a highly transparent gesture. Yet, their very clarity tended to magnify the opacity of the standards governing unscheduled jobs. Similarly, 1977's quantum leap in precision generated pressure for even greater elaboration. Yet even now the program is bedeviled by pockets of opacity such as the "job-related" reasons criterion for rejecting domestic job applicants. Yet, it appears unlikely that further increases in transparency would materially strengthen program effectiveness. The rule's history demonstrates how increases in transparency and complexity generate countervailing pressures for relaxation. The introduction of waivers from Schedule B in 1971 and the "recruitment reduction" and "harmless error" amendments of 1980 symbolize the difficulty of eliminating discretion altogether, even in a highly decentralized, heavy-caseload program such as the labor certification process.

E. The SEC's "Safe Harbor" Rules
for Resale of Unregistered Securities

The Securities Act of 1933 generally prohibits the public sale of "unregistered" securities -- that is, securities with respect to which no registration statement has been filed with the SEC. (205) A registration statement contains detailed financial, operating, and ownership information about the company issuing the securities (issuer). (206) The Act exempts private securities offerings from the registration requirement. (207) Since purchasers at private offerings -- often the issuer's incorporators, officers, directors, and their associates -- are usually knowledgeable and sophisticated investors, the Act's public information requirements are considered unnecessary in that

-
205. Securities and Exchange Act of 1933, § 5, codified at 15 U.S.C. § 77e (1980).
206. 15 U.S.C. § 77f (1980). For an analysis of the Act's disclosure requirements, see Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 *Hastings L.J.* 311 (1974).
207. 15 U.S.C. § 77d(2) (1980) (exempting "transactions by an issuer not involving any public offering").

context. An important question then arises whether and under what circumstances purchasers at a private sale may resell unregistered securities to the public. An absence of restrictions could permit easy circumvention of the registration requirement, while a flat prohibition would impair the value of privately issued securities by seriously restricting their liquidity.

The statute is not particularly instructive in resolving this common problem. The area of greatest uncertainty involves the definition of "underwriter," since the Act exempts transactions by persons "other than an ... underwriter." (208) The definition of "underwriter" leaves considerable room for doubt about its application to resellers. An "underwriter" is a person who purchases from an issuer "with a view to ... the distribution" of a security. (209) If the resale of an unregistered security to the public were considered part of its "distribution," the sale would expose the seller to civil and criminal liability. It has fallen to the Securities and Exchange Commission, as the Act's principal interpreter and enforcer, to resolve that uncertainty. With respect to the prohibition against public sale of unregistered securities, the SEC has both a prosecutorial and a legislative role. It may initiate a civil or criminal enforcement action against an alleged violator, (210) and it has explicit authority to insulate transactions against collateral attack in a private suit. (211)

-
208. 15 U.S. § 77(d) (1980). The meaning of "issuer" can also present interpretive difficulties in the context of resale by a person or entity controlled by or exercising control over the issuer. If such a person were to be treated as the "issuer," the public resale would be considered a public issue requiring registration. This case study focuses primarily on the "underwriter" (conduit) problem rather than the "issuer" (control) problem.
209. 15 U.S.C. § 77(b)(11)(1980).
210. 15 U.S.C. § 77(1)(1980).
211. 15 U.S.C. § 77(s)(1980).

For the first four decades of its existence, the SEC interpreted the "underwriter" exemption primarily through the vehicle of "no-action" letters.(212) Prospective resellers of unregistered securities could seek formal clearance for the proposed transaction, in the form of a letter from the SEC's staff announcing its binding commitment not to take enforcement action based on the transaction. Most no-action letters issued from the Commission's Division of Corporation Finance (hereinafter "Division"), although a few were approved by the Commission itself. Either way, the commitment was treated as binding on the SEC, provided that the facts were as stated in the request.

Although no-action letters provided justifications for the staff's ultimate conclusions, they were not considered precedents. Until 1970, in fact, the SEC did not even make them publicly available.(213) As a result, the staff's "policy" (such as it was) was accessible only to SEC specialists in the bar, some of whom privately compiled and exchanged letters obtained for their clients.(214) After 1970, the compilation and distribution (as well as indexing and digesting) functions have been performed by private services. The SEC staff did prepare internal summaries of "significant" no-action decisions, but these research aids were reportedly not "heavily utilized" by staff.(215)

The low internal use of precedents probably reflected both the routine nature of most requests and the open-textured and fact-specific nature of the SEC's substantive policy. According to a 1969 SEC staff study (the "Wheat Report"), the staff used a "subjective" test to determine whether the purchaser had taken the

-
212. For descriptions of the no-action process, see Lockhart, SEC No-Action Letters: Informal Advice As a Discretionary Administrative Clearance, Law & Contemp. Probs. 95 (1973), and Lowenfels, SEC No-Action Letters: Some Problems and Suggested Approaches, 71 Colum. L. Rev. 1256 (1971).
213. SEC Securities Act Rel. No. 5098, October 29, 1970, CCH Fed. Securities L. Rep. ¶ 77921.
214. Lockhart, supra note 212, at 106.
215. Id. at 115-16.

securities "with a view to distribution." (216) While the length of the holding period was considered probative of original intent, the Commission emitted rather confused signals about the length of time necessary to demonstrate "investment intent" (the opposite of "distribution intent"). One Commissioner publicly suggested a two year period, (217) while staff sometimes said five years, sometimes three. (218) Whatever the holding period necessary to cleanse a transaction, an investor who alleged a sufficiently compelling "change of circumstances" could obtain permission to sell a security held for a shorter period. (219) One could say with some assurance that a "change of circumstance" relating solely to the investment itself (such as one causing a decline in its market value) would not qualify. But, what sort of personal circumstances might move the staff was more difficult to predict.

Pressure to clarify the SEC's policy mounted in the late 1960s and early 1970s. Private practitioners and commentators deplored the lack of "certainty" in the Commission's policy, the apparent conflict between the staff's and commission's interpretations, and the resulting "unpredictable environment for investors." (220) The Wheat Report echoed many of these same criticisms and offered a series of proposed rules (the "160 series") to clarify its policy. (221) After receiving extensive public comment and

-
216. SEC, Disclosure to Investors -- A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts, at 163 (1969) (reprinted as CCH Fed. Securities L. Rep. No. 5213) [hereinafter cited as Wheat Report, so named because conducted by SEC staff under the direction of former Commissioner Francis M. Wheat].
217. See id. at 165.
218. See Levenson, Rule 144 and Other Current SEC Developments, in PLI Second Annual Institute on Securities Regulation 60, 69-70 (R. Mundheim & A. Fleischer, Jr., eds. 1971).
219. Wheat Report, supra note 216, at 166-70.
220. See Leiman, Registration Provisions in Venture Capital and Similar Financing Agreements, in R. Mundheim & A. Fleischer, Jr., supra note 218, at 101.
221. Wheat Report, supra note 216, at 174-77.

conducting further internal analysis, the SEC abandoned the approach embodied in the 160 series, and instead adopted Rule 144. (222)

Rule 144 utilized the so-called "safe harbor" technique: transactions that met all of its conditions were "deemed" to be exempt from the Act's registration requirement (and therefore immunized from civil or criminal liability). Transactions not fully satisfying the rule might also qualify for exemption, said the Commission, but the burden of proof on the proponent of exemption would be "substantial." (223) Even this small window was effectively closed by a simultaneous announcement that the SEC staff would no longer issue no-action advice concerning resale of restricted securities acquired after the Rule's effective date. (224)

Anchorage in Rule 144's "safe harbor," as originally dredged, required satisfaction of five conditions:

1. availability of "adequate current public information with respect to the issuer;"
2. a minimum holding period between purchase and proposed sale;
3. a quantity limitation on the amount sold;
4. sale in a "brokers' transaction;" and
5. notification of the sale to the SEC.

The Rule expressed each of the five conditions in highly objective terms. For example, the holding-period condition required that the seller have owned the security for a period of two years prior to the resale and contained elaborate conditions for establishing the acquisition date for securities acquired by promissory note, option, stock dividend, conversion, gift, bequest, or other

222. Securities Act, Rel. No. 5223, 37 Fed. Reg. 596 (1972), codified as amended at 17 C.F.R. § 230.144 (1981).

223. 37 Fed. Reg. 596 (1972).

224. Id.

means.(225) The volume limitation provision specified a formula (based on the percentage of outstanding shares in the class of securities involved or the average weekly volume of such securities traded on an exchange) for calculating a ceiling on the amount of securities a person may sell in exempt transactions within a six-month period.(226)

In the ten years since its issuance, Rule 144 has undergone repeated amendment. The SEC has substantively amended the rule nine times.(227) With the exception of two amendments designed simply to harmonize Rule 144 with other SEC rules,(228) this series of amendments has produced a steady relaxation of the original restrictions, at least as applied to sales by "nonaffiliates" (persons not in a control relationship with the issuer).(229) Nonaffiliates who have held securities for a specified holding period (now three years) have gradually been excused from compliance with other conditions (volume limits, manner-of-sale, and notice). This development suggests a gradual movement toward a simple holding period test, although at the present time the rule is a highly complex amalgam of the original conditions overlaid with newer exemptions.(230)

-
225. 17 C.F.R. § 230.144(d), as inserted by 37 Fed. Reg. 596 (1972).
226. 17 C.F.R. § 230.144(e), as inserted by 37 Fed. Reg. 596 (1972).
227. See 37 Fed. Reg. 20577 (1972); 39 Fed. Reg. 6069 (1974); 40 Fed. Reg. 6487, 44541 (1975); 41 Fed. Reg. 24701 (1976); 43 Fed. Reg. 43709 (1978); 44 Fed. Reg. 15610 (1979); 45 Fed. Reg. 6362 (1980); 46 Fed. Reg. 12195 (1981).
228. 40 Fed. Reg. 6487 (1975); 45 Fed. Reg. 6362 (1980).
229. See especially 44 Fed. Reg. 15610 (1979) (removing volume limitations on most sales by nonaffiliates after a holding period of 3 or 4 years, depending on type of security), and 46 Fed. Reg. 12195 (1981) (expanding class of securities exempt from volume limitations; setting uniform 3-year holding period for such securities; removing manner-of-sale restrictions on resale of such securities).
230. The newer exemptions have been codified as a new subsection (k) of the Rule. For the current revision of the Rule, see 17 C.F.R. § 230.144 (1981).

The SEC's official explanation for adopting Rule 144 in 1972 featured both substantive and formal arguments. The Rule renounced the old "change of circumstances" test in favor of an approach more directly linked to the goal of assuring adequate protection of unsophisticated purchasers. "[T]he circumstances of the seller," explained the Commission, "are unrelated to the need of investors for the protections afforded by the registration and other provisions of the Act." (231) But Rule 144 sought to change more than the focus of Commission policy. It sought to achieve greater "certainty" as well. (232) It was a deliberate exercise in precision enhancement, and it is the success of that exercise in which we are principally interested.

Contemporaneous justifications for Rule 144 invoke arguments falling under three headings of our "precision calculus" -- enforcement transaction costs, quality control costs, and compliance costs. The Wheat Report cited the "growing burden" of responding to no-action requests involving resales as a major justification for adopting bright-line rules. (233) The study estimated that its proposed series 160 rules would dispose of approximately 90 percent of the issues raised in the 500 no-action requests answered during the final two months of 1968. (234) A later study by William Lockhart sponsored by the Administrative Conference of the United States estimated that 80 percent of the Division's 5000 annual no-action replies concerned resale of unregistered securities. (235)

How onerous was this "burden"? A caseload of 3000 or 4000 seems impressive. But the no-action process was extremely informal and efficient, involving essentially only an exchange of correspondence. Internal legal research was very limited, dialogue between the agency and the applicant rare, and internal review perfunctory. Over half of the requests were answered in a month, and over 80 percent within two months. (236) Lockhart

-
231. 37 Fed. Reg. 596 (1972).
232. Id. (citing "uncertainty in the application of the registration provisions of the Act").
233. Wheat Report, supra note 216, at 175.
234. Id.
235. Lockhart, supra note 212, at 96.
236. Id. at 111.

estimated that the total staff resources devoted to no-action letters in the Division amounted to only 7.6 person-years.(237)

A proper accounting of the social cost of the SEC's pre-Rule 144 policy, however, must also include the resources expended by potential resellers (or their brokers) to obtain private legal advice on the transaction's exempt status. Although this cost does not figure in official SEC justifications for Rule 144 and we lack direct evidence of its magnitude, it undoubtedly exceeded SEC staff costs by a wide margin.(238) Indeed, the SEC had itself contributed to the growth of this expense by its 1970 decision to make all no-action letters publicly available.(239) The ready availability of no-action advice, on the other hand, presumably set a moderate ceiling on the amount most investors would invest in pretransactional legal advice.

Issuance of Rule 144 has unquestionably reduced the flow of inquiries to the SEC and, consequently, the staff resources required to answer them. The preface to Rule 144 announced that the SEC would no longer render no-action advice on transactions governed by the Rule. Although the Division of Corporation Finance still entertains informal requests for "interpretive" advice, its Deputy Director estimates the volume of these requests

237. Id. at 109.

238. The magnitude of the investment in private legal advice undoubtedly reflects the size of the seller's financial risk. The principal legal risk incurred by the reseller of unregistered securities is liability to the purchaser. Section 12 of the Act gives the purchaser an absolute right to rescind a sale in violation of the registration requirement without the need to prove scienter or reliance. See 15 U.S.C. § 771 (1980). This effectively makes the seller a guarantor against decline in the securities' value. The risk undertaken by a reseller, then, is a function of the sale price, the probability of a future decline in the securities' market value, and the probability that the resale will be judicially determined not to be exempt under Section 4. The larger the first two quantities, the more the reseller should be willing to invest in pretransactional legal advice to estimate or reduce the third quantity. Undoubtedly, this calculus would often justify substantial investments in legal advice.

239. See note 213 supra.

at less than ten percent of the previous inquiry volume.(240) Since Rule 144 is far more accessible and compact than the previous sprawling body of no-action letters, moreover, the cost of obtaining private legal advice must also have fallen markedly. These savings in rule-application transaction costs have been eroded, to be sure, by an increase in rulemaking costs. The Commission has revised Rule 144 repeatedly during its brief life and has also issued two extensive "interpretive releases." (241) But it seems safe to conclude that the overall impact of Rule 144 on transaction costs has been favorable.

Another concern articulated by the Wheat Report -- the "constant problem in providing reasonably consistent advice" (242) -- evokes internal quality control costs. Even apart from the substantive distortions in the old policy, its sheer vagueness led to misapplications, the Report suggested. As applied to SEC staff interpretations, the problem of inconsistency seems relatively insignificant. The SEC's clearance function was highly centralized. (243) Requests for no-action letters were handled by some 40 lawyers in the Division, organized in branches defined by class of corporate activity. Drafts of all responsive letters were, in turn reviewed by one of two Assistant Chief Counsels in the Division's Office of Chief Counsel and submitted to the Chief Counsel for signature. As the Wheat Report acknowledges, the difficulty of controlling consistency in so centralized a process is not particularly formidable. A more serious problem, the Report claimed, was erroneous application of policy by private counsel. Undoubtedly, many errors (both excessively restrictive and excessively liberal interpretations) did in fact occur. But the ready availability of inexpensive official advice and the sophistication of the regulated population could be counted upon to hold the number and magnitude of such errors in check.

The compliance-encouraging justification for the Rule offered by the SEC also seems overstated. The Wheat Report invokes a compliance concern when it complains that the Commission's "vague and imprecise" policies encouraged "unprincipled counsel" to endorse improper transactions. "The pressures are strong," says

-
240. Letter from John J. Huber, Deputy Director, SEC Division of Corporation Finance, to Jeffrey S. Iubbers, Acting Research Director, ACUS, Aug. 24, 1982.
241. SEC Interp. Rel. No. 5306, 37 Fed. Reg. 23180 (1972); SEC Interp. Rel. No. 6099 (August 2, 1979).
242. Wheat Report, supra note 216, at 176.
243. See Lockhart, supra note 212, at 108-11.

the Report, "and the temptation to cut the statutory corner is magnified by uncertainty." (244) But that same pressure was also constrained by some rather powerful counterforces, such as the exposure to section 12(1) liability and criminal and injunctive sanctions. A major public sale of unregistered securities leaves a rather clear trail for subsequent investigators. It usually involves "repeat players" (245) (securities lawyers, brokers, large-volume purchasers) who have a substantial reputational interest to protect. In the face of these realities, the Wheat Report's undocumented assertion is not particularly persuasive.

The transaction cost gains attributable to Rule 144's adoption must be balanced against any congruity problems occasioned by its application. While the preamble professed monolithic concern for protecting innocent purchasers, the SEC clearly recognizes a competing obligation to encourage capital formation. Indeed Rule 144's principal author, Alan Levenson, attributed the abandonment of the proposed "160 Series" rules to a fear of discouraging "venture capital" investments in new enterprise. (246) Yet, the history of Rule 144 suggests that its original restrictive conditions had that same effect. Fear of underinclusiveness drove the agency to the opposite excess and, in the process, to an extreme degree of complexity that probably diluted the Rule's intended transactional gains.

In its recent amendments to the Rule, however, the SEC appears to be moving toward a better balance of precision and complexity. The standard for sale of restricted securities by nonaffiliates is evolving toward a simple holding-period test plus requirement of public information. This simplified test promises to reduce overinclusiveness losses to manageable proportions, while greatly simplifying the task of interpreting and applying the Rule. Thus, while the original Rule 144 was itself a dubiously successful step in the quest for certainty, it has triggered an ongoing evolution that has brought the SEC closer to its goal.

244. Wheat Report, supra note 216, at 177.

245. See Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc'y Rev. 95 (1974).

246. Levenson, supra note 218, at 65.

F. Parole Release Guidelines

The American institution of parole dates back to 1875, when New York's Elmira Reformatory began experimenting with a release program patterned after the British "ticket of leave." (247) The use of parole release as an instrument of federal corrections policy began in 1910, with the creation of the United States Board of Parole. (248) The rapid growth of parole after the turn of the century reflects a shift in American correctional philosophy from purely punitive to rehabilitative goals. Progressive reformers viewed parole release as an act of mercy granted by the state to relieve the harshness of mechanical judicial sentences. Its growth paralleled the expanded use of indeterminate sentences. Together, these two discretionary instruments theoretically permitted the state to adjust the period of incarceration to fit the rehabilitative progress of the prisoner. (249)

Growing doubts about the wisdom and efficacy of the rehabilitative ideal brought the parole system (along with many other aspects of correctional policy) under increasing attack over the next half century. Some critics focused on the desirability of the rehabilitative goal, while others doubted its administrability. But, whatever their philosophy, most came to view the parole system as an exercise of essentially unrestrained official discretion parading behind a facade of individualized justice. (250) The United States Board of Parole, as the most visible parole agency, was a lightning rod for much of this criticism. Its response, in turn, represents an illuminating case study in the political economy of rule precision.

The federal parole release process in the late 1960s was very close to a pure example of official discretion. The system was then administered by the United States Board of Parole, a tiny agency located within the Justice Department, and consisting of eight members appointed by the President with Senatorial

-
247. Gurfein, *The Federal Courts Look at Parole*, 50 St. John's L. Rev. 223, 223 (1975).
248. Act of June 25, 1910, ch. 287, §2, 36 Stat. 819.
249. G. Giardini, *The Parole Process* 18-19 (1959).
250. See, e.g., K. Davis, *Discretionary Justice* 126-33 (1969); Kasenmeier & Eglit, *Parole Release Decision-Making Rehabilitation, Expertise and the Demise of Mythology*, 22 Am. U.L. Rev. 477 (1973).

confirmation.(251) Board members served overlapping six-year terms. The parole decisionmaking procedure was highly informal.(252) Once a federal prisoner became eligible for parole under the terms of his sentence,(253) he could request the Board to release him. Upon receipt of the request, the Board would schedule a "hearing" at the prison. The "hearing" was in reality a brief interview with the prisoner (averaging about ten to fifteen minutes), at which he might be asked a few questions about his record and given a chance to make any personal statement he might wish.(254) At one time, hearings were conducted solely by Board members. Later the Board hired eight "hearing examiners" to conduct about two-thirds of its hearings.(255) The hearing examiner would prepare a summary of the hearing, which would be referred to two members of the Board. If they agreed on the disposition (not to release or to release and, if the latter, on what conditions), the matter ended there. If they disagreed, a third member was brought in to break the tie. Occasionally, a case might be referred to the full Board.(256) The Board gave no reasons to disappointed applicants for denying their request for parole release.

-
251. See 18 U.S.C. §4201 (repealed in 1976). It is now administered by the United States Parole Commission, consisting of nine members appointed by the President with the advice and consent of the Senate. See Parole Commission and Reorganization Act of 1976, 90 Stat. 219, 18 U.S.C. §4201 (1980). Since this study focuses primarily on the decision to adopt the original guidelines in 1973, the term "Board" is most often used to refer to the agency.
252. See Johnson, Federal Parole Proceedings, 25 Ad. L. Rev. 459, 461-61, 467-71 (1973); Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 820-21 (1975) [hereinafter cited as Yale Project].
253. For most adult offenders, after serving one-third of the full sentence. See Yale Project, supra note 252, at 818-19.
254. Johnson, supra note 252, at 468.
255. Id.
256. Id. at 471-72.

Written standards for parole release decisions provided virtually no additional guidance. The statutory standard then in force provided simply:

If it appears to the Board of Parole...that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.(257)

The Board's published rules elaborated on this sparse statutory language only slightly, by listing "factors...considered by the Board in its decision making."(258) The list contains 33 items grouped under nine headings. A representative sample is the six items under "F. Personal and Social History":(259)

- (1) Family and marital
- (2) Intelligence and education
- (3) Employment and military experience
- (4) Leisure time
- (5) Religion
- (6) Physical and emotional health.

One would have to search diligently to find a collection of regulatory words that conveys so little meaning about the decisional rule, if any, being applied.

In 1971, Board's staff began to work on developing a set of more articulate guidelines for parole release. Its effort

-
257. 18 U.S.C. §4023(a) (repealed in 1976).
258. Rules of the U.S. Board of Parole, Effective January 1, 1971, at 14.
259. Id. at 15.

coalesced around the establishment of two indices, one designed to measure the severity of the inmate's offense, the other designed to measure the probability of recidivist behavior. The staff utilized different approaches to construct the two indices. The "offense severity" index relied solely on the subjective judgment of the eight Board members. (260) The staff prepared brief descriptions of 65 criminal behaviors which the Board members and hearing examiners individually ranked into seven categories of relative severity. The staff then repeated the exercise with 51 offenses and six severity categories. After computing mean ratings and making some adjustments based on group discussion, the Board adopted a scale grouping most common offenses into six severity categories (ranging from "Low" to "Greatest").

The Board conducted a statistical analysis of post-release behavior to formulate the predictive index. (261) Using three samples drawn from the population of prisoners released during the first six months of 1970, the staff attempted to determine those attributes most highly correlated with parole "success" or "failure". Parole success was defined as the absence (during the two year period following release) of: 1) a conviction resulting in a sentence of 60 days or more, 2) a return to prison for a technical parole violation, or 3) an outstanding absconder warrant. After crosstabulating 66 offender characteristics (called "salient factors") with the dependent variable (success or failure), the staff selected nine salient factors that had the greatest predictive value: number of prior convictions, number of prior commitments, age at offense leading to first commitment, whether a commitment offense involved automobile theft, prior parole revocation or failure, history of drug dependence, employment history, and marital status. (262) The first two

-
260. The process is described in greater detail in Hoffman, Beck & De Gostin, *The Practical Application of a Severity Scale in Parole: Legal Issues, Decision-Making, Research* 169 (W. Amos & C. Newman, eds. 1975).
 261. For a description of the process, see Hoffman & Beck, *Parole Decision-Making: A Salient Factor Score*, 2 *J. Crim. Justice* 195 (1974).
 262. The Board and Commission have gradually reduced the list to six. See 28 C.F.R. § 2.20 (Salient Factor Score) (1982). In the process, they have eliminated the "status" variables like education and employment, in favor of exclusively behavioral variables, but with no loss of predictive power.

salient factors listed above were measured by a trinary scoringsystem. For example, a prisoner would receive a "prior convictions" score of "2" if he had had no prior convictions, "1" if he had had one or two prior convictions, and "0" for three or more prior convictions. The Board used a binary scoring system ("0" or "1") to measure the other seven factors. To compute an inmate's total "salient factor score," then, one had simply to sum his scores on the nine items. For purposes of administrative convenience, the staff then collapsed the range of 12 possible total scores (0 to 11) into four categories: "poor" (0-3), "fair" (4-5), "good" (6-8), and "very good" (9-11). As the statistical results indicated, the percentage of parolees with successful outcomes increased as one moved up the scale. (263)

The final step was to combine the two scales into a six-by-four matrix specifying the detention period appropriate for each combination of offense severity and offender characteristics. (264) Here, the Board consciously decided to adhere as closely as possible to its prior practice. For each cell in the matrix, the researchers established a range of detention periods within which most of the Board's past decisions had actually fallen. After smoothing and adjusting the ranges to reflect the Board's views, the staff produced a set of "guidelines" showing a range of detention periods (in months) appropriate for each combination. For example, the guideline period specified for persons sentenced for a "moderately" severe offense (such as bribing a public official or unauthorized possession of a machine gun), who were considered "very good" risks, was 12 to 16 months. The detention period for a "poor" risk convicted for the same offense, on the other hand, was 24 to 30 months.

In an effort to test their workability, the Board experimented with the proposed guidelines in one of its five regional offices, beginning in October 1972. (265) The project proved sufficiently

-
263. For example, in the "construction" sample, the "success" rate (percentage of parolees with successful parole outcomes) rose from 50 percent for the "poor" risks, to 61 percent for the "fair" risks, to 77 percent for the "good" risks, to 93 percent for "very good" risks. Hoffman & Beck, supra note 261, at 202.
264. This step is described in Gottfredson, Hoffman, Sigler & Wilkins, Making Paroling Policy Explicit, Crime & Delinquency (1975).
265. Yale Project, supra note 252, at 822, n. 58.

successful to induce the Board to adopt the Guidelines on a nationwide basis in September 1973. (266) Although they have undergone repeated modification and elaboration, the Guidelines have been in continuous use since then. (267) After surviving early attacks in various courts, (268) the guidelines received strong implicit Congressional endorsement in the Parole Commission and Reorganization Act of 1976. (269) In addition to a number of structural and procedural reforms, including replacement of the Board with a nine-member "Parole Commission," the Act directed the agency to "promulgate rules and regulations establishing guidelines" for parole release. (270) The clear intent of this provision was to ratify the Board's general approach, if not its specific rules.

As originally adopted (and still today), the guidelines left considerable room to individualize parole release decisions. Expressing the appropriate detention period as a range, rather than as a fixed value, preserved an important degree of discretion. The outer bounds of those ranges, moreover, are "merely guidelines" that may themselves be varied "when circumstance warrant." (271) The power to individualize by deviating from the guidelines remains largely unfettered by positivistic constraints. To keep the rate of variance under control, the Board chose to rely, instead, on a procedural device of requiring decisionmakers to justify deviations. (272)

-
266. 38 Fed. Reg. 31942 (1973).
267. For the current version, see 28 C.F.R. §2.20 (1981).
268. E.g., *Billiteri v. United States Bd. of Parole*, 541 F.2d 938 (2d. Cir. 1976); *Battle v. Norton*, 365 F.Supp. 925 (D. Conn. 1973); *Wiley v. United States Bd. of Parole*, 380 F.Supp. 1194 (M.D. Pa. 1974); *DeVyver v. Warden*, 388 F.Supp. 1213 (M.D. Pa. 1974).
269. Pub. L. 94-233, 90 Stat. 219.
270. 18 U.S.C. §4203(a)(1)(1980).
271. 28 C.F.R. §§2.20(c)(1981).
272. 28 C.F.R. §2.13(d) (1981). The percentage of cases decided within the guideline limits, was over 90 in early years, Yale Project, supra note 6, at 869, n. 293, but has fallen to around 80 more recently. Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 Hofstra L. Rev. 89, 108 (1979).

A good deal of discretion is also inherent in the offense severity scale. Although the scale has undergone considerable elaboration, it still relies on very abbreviated offense descriptions(273) and, for multiple offenses or unclassified offenses, commits the classification decision to the decisionmaker's judgment.(274) The "salient factor score," by contrast, utilizes relatively objective measures such as number of "prior convictions" or "age at commencement of the current offense." (275) But it does preserve a little room for judgment, as, for example, in the criterion "history of heroin or opiate dependence." (276)

However extensive the open texture in the guidelines, their adoption in 1973 represented a quantum leap in the precision of the Board's policy. Development of the parole guidelines was an exercise in policy clarification as pure as one is likely to encounter outside the laboratory. The Board's motivation was not to adopt a new or substantially revised policy, but to codify an existing, albeit inchoate, policy.(277) The result has been widely applauded as a welcome advance in the fairness of parole decisionmaking.(278) Superficially, at least, the Board's action does indeed seem to warrant commendation. Yet here, as always, greater precision is achieved at a price. And a careful assessment of the guidelines' costs reveal the heavy justificatory burden its asserted benefits must bear.

-
273. See 28 C.F.R. §2.20 (Offense Characteristics) (1981). For a criticism of some of the Board's offense categories, see Alschuler, Sentencing Reform and Parole Release Guidelines, 51 U. Colo. L. Rev. 237, 244-45 (1980).
274. 28 C.F.R. §2.20 (General Notes, B-E (1981)).
275. 28 C.F.R. §2.20 (Salient Factor Score, Items A & C) (1981).
276. Id., Item F.
277. Interview with Peter Hoffman, Research Director, U.S. Parole Comm'n., Washington, D.C., December 9, 1980.
278. See e.g., Alschuler, supra note 272; Gottfredson, Parole Guidelines and the Reduction of Sentencing Disparity: A Preliminary Study, 16 J. Research in Crime & Delinquency 218 (1979); Yale Project, supra note 252.

The guidelines have almost certainly increased rulemaking and enforcement costs. Their initial development was expensive. The bulk of the research necessary to establish the salient factor score was funded by a grant from the Law Enforcement Assistance Administration.(279) Developing the offense severity scale, computing the detention periods, and securing agreement among the eight members of the Board consumed large quantities of staff and Board time.

Maintenance and application of the guidelines, moreover, impose ongoing rulemaking costs. Roughly a quarter of the agency's \$200,000 annual research budget is devoted to this function.(280) The Board systematically reviewed the guidelines periodically--in the first few years, at six-month intervals; now, on an irregular basis.(281) These periodic reviews have spawned frequent amendments. Another component of ongoing rulemaking costs is the requirement that decisionmakers provide special written justification for deviating from the suggested detention periods in the ten to twenty percent of cases where that occurs.

This heavy initial and continuing investment in rulemaking did not replace any significant ongoing rulemaking costs implicit in the pre-guidelines regime. Board members did undoubtedly discuss policy issues from time to time. But, since the panels did not customarily give a reason for their decisions, the resources expended on developing a "common law" of parole release were negligible. It is true that, contemporaneously with issuing the guidelines, the Board began furnishing a statement of reasons to disappointed applicants.(282) But that procedural reform was apparently as much an effect as a cause of the guidelines' promulgation.

Neither did the guidelines reduce rule-application transaction costs. It is true that the Board had a substantial caseload, considering its limited resources. In 1970, for example, it conducted 11,784 hearings, most of them involving parole

-
279. Hoffman interview, supra note 276. The Board received a grant of \$600,000, of which roughly two-thirds was devoted to guidelines development.
280. Hoffman interview, supra note 276.
281. Hoffman & De Gostin, Parole Decision-Making: Structuring Discretion, Federal Probation, December 1974, at 9-10.
282. See Hoffman & DeGostin, supra note 279.

applications.(283) While this number had declined in the late 1960's, it began to rise slightly in the early 1970's.(284) Since the Board denied about half of its parole applications,(285) one might imagine that clearer eligibility rules could greatly reduce its caseload by discouraging futile petitions. But, this consideration played little part in the decision to adopt guidelines.(286) This is not surprising. Almost all prisoners apply for parole once they become eligible and would probably be expected to do so under almost any regulatory regime. The cost to them of applying, after all, is almost zero. Since the reward from successful application in enhanced liberty is quite large, almost any perceived probability of success would justify making the effort. And, in fact, the number of Parole Board hearings has not declined appreciably since the guidelines were adopted.(287)

A second enforcement-cost hypothesis for adopting the guidelines--reducing the average cost per decision--must also be rejected. Cost per decision was already about as low as one could reasonably imagine: hearings averaged only ten to fifteen minutes. The very opacity of the Board's policy gave the adversarially disadvantaged applicant very little to focus on. If anything, the average length of hearings has increased since adoption of the guidelines,(288) although this may be fully attributable to the procedural reforms instituted simultaneously

-
283. Johnson, supra note 252, at 304.
284. [1970-1972] U.S. Bd. of Parole, Biennial Rep. 20 (11,848 in 1971; 12,694 in 1972).
285. Id. at 22 (53 percent denial rate in 1971, 50 percent in 1972).
286. Hoffman interview, supra note 276.
287. [1976-1978] U.S. Parole Comm'n. Rep. 15 (12,056 in 1975, 11,919 in 1978).
288. Johnson reported that each hearing examiner scheduled up to 20 hearings per day in 1971. Johnson, supra note 252 at 468. The Yale Project reported an average 15 per day in 1974. Yale Project, supra note 252, at 832, n. 103. Hoffman reported an average of 10 to 12 per day in 1980. Hoffman interview, supra note 276.

with the guidelines' adoption. (289)

Even if the guidelines did not reduce the cost of parole decisionmaking, one would surely expect them to enhance its quality (by reducing the number of erroneous or inconsistent decisions, or by reducing the internal costs of maintaining a given level of quality). While the positive value of this variable seems assured, its magnitude is much more problematic. Direct measures of pre-guidelines decisional quality are nonexistent, and indirect measures scarce. One plausible indirect measure is the rate of disagreement among members of decisionmaking panels in parole release cases. A high rate of disagreement, by implying a high rate of inconsistency, suggests a large error rate. Given the extreme centralization of pre-guidelines parole decisionmaking, one would not expect a high rate of disagreement. It is true that the Board had recently devolved the conduct of most hearings to eight hearing examiners, but the actual parole release decisions were still made by the eight Board members, sitting in panels of two. Not only did the shifting composition of the panels assure constant interaction among Board members, but de facto specialization compressed even further the effective size of the decisionmaking body. (290)

-
289. These procedural reforms, including a right to be accompanied by a representative, a written statement of reasons for denial, are described in DeGostin & Hoffman, *Administrative Review of Parole Decisions*, Federal Probation, June, 1974.290. Five Board members specialized in adult cases and three in juvenile cases. Johnson, supra note 252, at 462.
290. Five Board members specialized in adult cases and three in juvenile cases. Johnson, supra note 252, at 462.

Direct evidence of internal consistency supports this prediction. In constructing the offense severity scale, Board staff found a "quite high" rate of agreement among Board members on the ratings assigned to offense categories.(291) The "high correlations" revealed by a later statistical analysis of the Board's 1971 youth parole decisions suggested a "fairly consistent (although implicit) youth parole selection policy."(292) Another study found "split votes" (disagreements among panel members) in only 17 percent of 1212 randomly selected adult parole decisions during 1971 and 1972.(293)

However modest the absolute magnitude of the Board's quality-control problem, the evidence suggests that the guidelines did effect a significant relative improvement. Two recent studies comparing the length of judicial sentences with time actually served indicate that Parole Board decisions have reduced sentencing disparities to a markedly greater extent after the guidelines' promulgation than before.(294) In another study of parole

-
291. Hoffman, Beck & DeGostin, supra note 260, at 179. The rate of agreement among hearing examiners was even higher. Id. at 172.
292. Hoffman, A Paroling Feedback Method, in W. Amos & C. Newman, eds., supra note 260, at 343, 351.
293. Hoffman, Gottfredson, Wilkins & Pasela, The Operational Use of an Experience Table, *Criminology*, August 1974, at 214, 225. Johnson, supra note 252, at 462, reported an "informal estimate" by the Board of split decisions in 30 percent of cases. The methodology yielding the 17 percent figure seems more reliable, though the difference may reflect sampling differences.
294. Compare Gottfredson, Parole Board Decision Making: A Study of Disparity Reduction and the Impact of Institutional Behavior, 70 *J. Crim. L. & Criminology* 77, 82 (1979) (sample of 1970-1972 parole decisions: 13 percent overall sentencing disparity reduction attributable to parole decisions), with Gottfredson, supra note 277, at 225 (sample of 1977 and 1978 decisions: disparity reduction of 26 to 46 percent, depending on offense and salient factor categories). Since the studies used a definition of "disparity" corresponding to the guidelines' classifications, the results may merely reflect a spurious "guidelines effect" rather than a real "disparity" reduction. See Gottfredson, supra note 277, at 227.

hearings conducted shortly after the guidelines' promulgation, observers found split decisions in only three of the 109 hearings observed.(295) While suggestive only, these data attest to the efficacy of the guidelines as a consistency-promoting mechanism.

One is left, in assessing the consequences of parole guideline development, with their impact on primary behavior. One conceivable justification for parole guidelines is their potential for motivating socially beneficial conduct during incarceration. By conditioning parole eligibility on the performance of (or more likely the avoidance of) certain well-defined acts or the attainment of certain well-defined personal skills, guidelines could substantially reinforce the rehabilitative and order-preserving objectives of prison regimens. But that was not, in fact, a principal function of the guidelines. By the early 1970s, the Board had concluded that the presumed relationship between participation in prison programs and rehabilitation had not been scientifically demonstrated.(296) Consequently, in fashioning its detention policy, the Board focused primarily on the deterrent and incapacitative goals of incarceration. Consequently, the two indices that determine presumptive release dates are based solely on preadmission behavior or conditions. They have nothing whatever to do with conduct or attainments while in custody. The only nod to in-prison behavioral considerations in the original rules was the proviso: "These guidelines are

-
295. Yale Project, supra note 252, at 832, n. 102. The probative value of this datum is diminished by doubts concerning the sample size and composition. The sample included only 69 initial parole decisions and 30 decisions on review. Id. at 829, n. 95. There is no indication that the sample was selected at random. Direct comparison with the earlier 17 percent figure is hampered, moreover, by intervening procedural changes -- particularly the fact that, after 1973, panel members discussed the case between them before rendering the decision.
296. Yale Project, supra note 252, at 826, 828, 848, 886. For support from the social sciences, see e.g., D. Lipton, R. Martinson & J. Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975); G. Kassenbaum, D. Ward & D. Wilner, *Prison Treatment and Parole Survival* (1971).

predicated upon good institutional conduct and program performance."(297)

A second possible behavioral justification for parole guidelines is their impact on primary criminal behavior. That is, by giving potential criminals indication of the actual detention periods associated with particular conduct, guidelines might promote the general deterrence goals of the criminal justice system. This rationale assumes that sentencing judges will rarely defeat the guidelines' operation by setting especially high minimum or low maximum sentences. Such judicial behavior would obviously undermine any possible gain in predictability afforded by the rules. In fact, however, it appears that this is not a serious problem. Judicial sentences rarely conflict with the guidelines, partly because the rules themselves reflect pre-existing judicial patterns and partly because judges increasingly take the guidelines into account in making current sentencing decisions.(298)

A more serious objection to the "general deterrence" justification is the cognitive assumptions on which it rests. It seems highly unlikely that many potential criminals are aware of the guidelines' existence, much less their contents. Nor can one assume that expanded knowledge of the guidelines, even if achievable, would materially change primary behavior. Criminologists increasingly question the rational-man model of deterrence on which this entire argument is premised.(299) Many doubt that severity of punishment has any significant deterrent effect on most crimes against persons or property. Rational calculation probably does occur in some contexts -- such as organized and white collar crime. But the incremental deterrence afforded by translating an opaque parole policy based on offense severity and parole prognosis into a more explicit formula is probably slight, especially in view of the fact that the Parole Board cannot control or anticipate the other major component of the rational deterrence calculus -- probability of conviction.

-
297. Note 5 to §2.52, as promulgated in 38 Fed. Reg. 31942, 31943 (1973). The current rules do, however, have more explicit provisions specifying increments to the presumptive release date for rule infractions and reductions for "superior program achievement." 28 C.F.R. §§ 2.36, 2.60 (1981).
298. Yale Project, supra note 252, at 882, n. 360.
299. See e.g., Bankeston & Cramer, Toward A Macro-Sociological Interpretation of General Deterrence, 12 Criminology 251 (1974); Geerken & Gove, Deterrence: Some Theoretical Considerations, 9 L & Soc'y Rev. 497 (1978).

Even if the guidelines have little or no impact on pre-conviction or in-prison conduct, they might be justified as more effectively serving the incapacitative goals of incarceration. That is, the guidelines might have increased the "congruence" between Board decisions and the objective of incapacitating harmful persons. The scientific methodology used by the Board to develop its salient factor score lends credence to this hypothesis, as do some studies purporting to show that the guidelines have reduced sentencing disparity. (300) But the plausibility of this hypothesis is very difficult to assess. We have very little evidence of the degree to which the Board's previous policies correctly related the period of detention to the risk of antisocial conduct.

Even the much more rigorous methodology used to develop the guidelines leaves many questions unanswered. The analysis used a definition of parole "failure" that only very crudely measures severity of antisocial conduct. The predictive index relies, moreover, on probabilistic distinctions that are not very sharp. For example, the probability of a favorable outcome in the Board's original sample falls from 77 percent for "good" risks to 61 percent for "fair" risks. (301) Some subsequent studies have found even smaller differentials. (302) Whether such modest risk differentials justify incarcerating "fair" risks 25 to 50 percent longer than "good" risks is at least debatable. The guidelines do permit deviation in individual cases, but that fact alone is no argument for favoring guidelines over the previous system of total ad hoc judgment. It is only to the extent that the guidelines channel individualized judgments into new (and preferable) patterns that they can be defended on this score.

Overall, then, the guidelines receive mixed ratings from our "precision calculus" -- a modest gain in decisional consistency, a modest loss in rulemaking and processing costs, and an uncertain impact on decisional congruence. This somewhat unsatisfying outcome may suggest flaws or incompleteness of analysis. For example, guidelines development has probably had a positive impact on the behavior of other audiences, such as prosecutors, judges, and even legislators by clarifying Parole Board policy and making

300. See note 294 supra.

301. Hoffman & Beck, supra note 261, at 202.

302. Hoffman, Stone-Meierhoefer & Beck, Salient Factor Score and Release Behavior: Three Validation Samples, 2 L. & Human Behavior 47 (1978).

more visible previously submerged value conflicts in penology. It may also, by providing a better basis for reason-giving, have enhanced prisoners' subjective sense of satisfaction with the system. But, the real source of discomfort may lie deeper. The very methodology of this study -- its stubbornly utilitarian focus -- does not capture every value at work in administrative practice. Here, in particular -- in a regime that deals with individuals in their most vulnerable state, that makes judgments about their social acceptability or worthiness, and that has direct consequences for their personal liberty -- some deontological concept of fairness or justice clamors insistently for recognition. Whatever its precise contents, that concept seems to demand some degree of articulation greater than the Board's previous policy of official silence.

G. Penalty Standards for Hazardous Materials
Transportation Act Violations

Federal regulation of hazardous material transportation has grown steadily since 1871, when Congress first authorized the Secretary of the Treasury to regulate transportation of certain explosives, flammables, and acids on passenger-carrying vessels in navigable waters of the United States.(303) The Secretary delegated his power to the Commandant of the United States Coast Guard (hereafter referred to as the USCG), then housed organizationally within Treasury. Over the next hundred years various acts have broadened the Coast Guard's regulatory powers.(304) Regulation of land transportation began with the Transportation of Explosives Act of 1908, which authorized the Interstate Commerce Commission to set standards for shipment of explosives by rail.(305) The Federal Aviation Act of 1958 gave the Federal Aviation Authority power to regulate hazardous material shipments by air.(306)

-
303. 16 Stat. 441 (1871).
304. See 46 U.S.C. § 170 (1980).
305. 35 Stat. 554 (1908).
306. Pub. L. 85-726 (1958).

Only in the last 15 years, however, has transportation of dangerous substances received truly widespread attention. The Department of Transportation Act of 1967(307) grouped all regulatory functions under one departmental roof, but left legal authority split between the Secretary of Transportation (for water transportation) and the semi-autonomous administrators of the Federal Aviation, Highway, and Railroad Administrations (hereafter referred to as the FAA, FHWA, and FRA, respectively). In 1970, Congress strengthened the Secretary's powers, (308) but it was not until the passage of the Hazardous Materials Transportation Act of 1975 (hereinafter referred to as HMTA)(309) that the Secretary was given plenary authority over all four modes of shipment.

The Act authorized the Secretary to designate materials whose transportation in commerce "may pose an unreasonable risk to health and safety or property" as a "hazardous material" (310) and to promulgate regulations "for the safe transportation in commerce" of such materials.(311) The Act's chief enforcement provision authorizes the Secretary to impose, "after notice and an opportunity for a hearing," a civil money penalty of not more than \$10,000 per violation on anyone who "knowingly commit(s) an act which is a violation" of the Act or a rule issued thereunder.(312) Each day of violation of a rule relating to shipper or carrier obligations constitutes a separate violation. The statutory standard for computing the appropriate penalty reads:

In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of

-
307. Pub. L. 89-670 (1967)
308. Hazardous Materials Transportation Control Act of 1970, Pub. L. 91-458 (1970).
309. Pub. L. 93-633, Title I, 88 Stat. 2156, codified at 49 U.S.C. §§ 1801-1812 (1980).
310. 49 U.S.C. § 1803 (1980).
311. 49 U.S.C. § 1804 (1980).
312. 49 U.S.C. § 1809 (1980).

prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. (313)

Once administratively determined, a penalty may be recovered by civil action in a federal district court by the Attorney General. Prior to referring a case to the Attorney General, the Secretary may compromise the claim. (314)

Pursuant to the statutory authority to promulgate safety standards, the Secretary designated some 1800 substances as "hazardous materials," (315) ranging in apparent danger from bombs and chlorine gas to oil paint and straw. The Secretary then proceeded to adopt some 1200 pages of rules specifying in exquisite detail how these various substances must be labeled, documented, handled, loaded, and stored. (316) Most of these rules were adopted wholesale, with little careful analysis, from bodies of pre-existing consensus standards issued by private standard-setting organizations. (317) As is the case in most contemporary health and safety regulation, these rules consist overwhelmingly of specifications standards rather than performance standards.

The Secretary delegated responsibility for enforcing these standards against carriers and shippers by air, highway, rail, and water to the four modal administrations (FAA, FHWA, FRA, and USCG, respectively). The Research and Special Programs Administration (RSPA), also responsible for writing the standards, received authority to enforce the container specifications against container manufacturers. In marked contrast to the excruciating detail of the substantive standards, this delegation of enforcement authority was accompanied by virtually no guidance on enforcement priorities or sanctioning policy.

-
313. 49 U.S.C. § 1809(a)(1) (1980).
314. 49 U.S.C. § 1809(a)(2) (1980). This provision contains no independent criteria for the "compromise" of such a claim.
315. 49 C.F.R. § 172.101 (1981).
316. 49 C.F.R. Parts 171-79 (1981).
317. For a general description of this process, see Hamilton, The Role of Non-Governmental Standards in the Development of Mandatory Federal Standards Relating to Safety or Health, 56 Tex. L. Rev. 1329 (1978).

The enforcement process in each of the five units begins with an on-site inspection, either in response to an incident report or complaint, or as part of a random selection process. The majority of inspections fall into the latter category. (318) If the inspector detects an apparent violation, he may either try to resolve the problem on the spot or recommend formal enforcement action. Although the agency does not keep records of the number of violations detected, observers and participants estimate that the majority of violations are disposed of by simple verbal warnings or orders to correct. A smaller fraction results in written warnings or orders to correct, issued either by the inspector or by a superior. A smaller number still are referred, by way of the inspector's supervisors, to agency prosecutorial personnel with a recommendation to institute a formal compliance action.

In four of the five agencies (all but USCG) prosecution of HMTA violations is the responsibility of a small group of attorneys (from one to six) in that agency's Office of Chief Counsel. For almost all of these attorneys, HMTA enforcement is only one of several areas of responsibility. In the USCG, by contrast, the prosecutorial function is exercised by nonlawyer "hearing officers" in the several Coast Guard District Offices.

In practice, "formal enforcement action" almost invariably means assessment of a civil money penalty. The Act does provide for criminal penalties and injunctive relief, as well. (319) But use of these two sanctions requires referral to the Department of Justice for prosecution and trial, whereas DOT has self-contained authority to impose civil fines. It is therefore hardly surprising that the agency relies almost exclusively on that sanction.

What is perhaps more surprising is that virtually all of the civil penalty cases initiated by agency lawyers are resolved by compromise without the necessity of even the administrative hearing guaranteed by the Act. Agency lawyers, then, not only exercise the prosecutor's customary de jure control over initiation of a legal action, but also exercise nearly complete de facto control over its termination as well. Table I shows the volume, level, and dispersion of penalty assessments by the five enforcement units for the twelve-month period ending June 30, 1979.

318. See C. Diver, A Study of the Effectiveness and Fairness of DOT Hazardous Materials Enforcement Penalties, Final Report to the General Counsel, U.S. Dept. of Transportation, June 1980, at 30 [hereafter cited as HMTA Penalty Study] (80 percent of penalty assessments result from general survey inspections).

319. 49 U.S.C. § 1809(6) (1980).

TABLE I
 PENALTY ASSESSMENTS, BY ENFORCEMENT UNIT
 (cases closed with penalty assessment,
 July 1, 1978-June 30, 1979(320))

	<u>Enforcement Unit</u>				
	<u>FAA</u>	<u>FHWA</u>	<u>FRA</u>	<u>USCG</u>	<u>RSPA</u>
Number of Cases	84	71	42	129	22
Number of Violations Cited	281	211	267	339	244
Initial Assessment per Case(321)					
Range (\$)	19950	65800	77500	79550	27200
Median(\$)	2000	6000	8000	650	3500
Mean (\$)	2693	8576	14964	7769	6528
Coeff. of Disp. (322)	1.19	1.04	1.20	1.85	1.55
Final Assessment per Case(323)					
Range (\$)	7475	59900	66050	3950	8500
Median (\$)	800	3000	4000	250	2000
Mean (\$)	1532	4198	9834	453	2839
Coeff. of Disp.	1.09	1.76	1.34	1.25	.94
Initial Assessment per Violation					
Range (\$)	9950	23833	9750	14975	5800
Median (\$)	500	3000	3000	375	1000
Mean (\$)	1028	3686	3549	2564	1415
Coeff. of Disp.	1.57	.95	.69	1.57	.98
Final Assessment per Violation					
Range (\$)	1000	8000	8875	2000	2000
Median (\$)	300	1000	1940	100	375
Mean (\$)	539	1542	2367	223	499
Coeff. of Disp.	1.24	.95	.81	1.38	1.01

320. Source: HMTA Penalty Study, supra note 318, at 25, 41.
321. "Initial assessment" is the penalty amount initially proposed in the prosecutor's notice of violation.
322. Coefficient of dispersion (ratio of standard deviation to mean). W. Spurr & C. Bonini, *Statistical Analysis for Business Decisions* 84-85 (1973).
323. "Final assessment" is the penalty amount finally accepted in settlement of the claim.

The discretion of HMTA prosecutors, like that of criminal prosecutors, has two dimensions: charging and sentencing. The charging decision involves the nature and the number of offenses to cite in the notice of violation. Even though the governing regulations prescribe highly objective and readily verifiable standards of conduct, agency prosecutors exercise considerable discretion over the selection of detected violations to cite, the aggregation or disaggregation of related offenses, and the appropriate unit for defining the violation (by separate package or entire shipment, per day or per incident). The prosecutor's sentencing discretion consists of selecting the amount of the fine to propose and accept in compromise within the statutory ceiling of \$10,000 per violation.

Neither the Secretary nor the administrators of the agencies that enforce HMTA have made much effort to constrain the exercise of their prosecutors' sentencing discretion by explicit instructions. FRA did promulgate a staff instruction that specifies "benchmark" initial assessment amounts for 14 of the most common serious violations (for example, overfilling tank cards, failure to placard, or failure to place a buffer car between certain dangerous loads and crewed cars). (324) But these are only "points of departure," and FRA attorneys are exhorted to consider all of the statutory considerations in calculating the actual amount in any given case. The Coast Guard Commandant issued an instruction relating to penalty assessments. (325) But it goes no farther than to recite the importance of distinguishing between "major" and "minor" violations (undefined) and to suggest consideration of compliance costs and compliance history. Neither of the other three agencies, nor the Secretary, has issued any guidelines on computing penalty levels, despite the recommendations of the Comptroller General (326) and the Department's own consultant. (327)

The low degree of precision that characterizes the Transportation Department's "sentencing" policy is not difficult to explain. None of the factors customarily impelling policymakers toward high degrees of regulatory transparency operate with much force here. The caseloads,

324. See HMTA Penalty Study, supra note 318, at 14.

325. USCG, Commandant Instruction 16601.1 (July 7, 1978), described in HMTA Penalty Study, supra note 318, at 18.

326. Comptroller General of the U.S., Need for Improved Inspection and Enforcement in Regulating Transportation of Hazardous Materials (May 1, 1973).

327. HMTA Penalty Study, supra note 318, at 75-88.

first of all, are modest. The Department as a whole processed less than 350 penalty cases to completion in the twelve-month period ending on June 30, 1979. No single enforcement unit handled more than 130 cases. And, while the statute requires the Department to offer respondents an "opportunity for hearing," the procedure followed in most cases is highly informal. Although respondents contest initial notices of violations in about four of every five cases, rarely does the challenge involve more than an exchange of correspondence or informal conference.(328) The relatively modest penalties demanded in most cases discourage heavy investment in defensive tactics by respondents.

It is true that the nominal penalty assessment rarely measures fully the accused's stakes in a case. Nonpenalty costs associated with a determination of liability—such as the cost of correcting a violation or preventing its recurrence—can dwarf direct penalty costs.(329) But liability is rarely an issue in HMTA cases.(330) The substantive regulations rely very heavily on specification standards, compliance with which can be verified objectively by observation or testing. The multi-level screening process from inspection to prosecution, moreover, tends to filter out cases of dubious liability.(331) Since most nonpenalty costs flow from the determination of liability rather than computation of the penalty, the nominal penalty amount does in fact define a reasonable outer bound on the potential payoff from challenging a violation notice.

Quality control costs do not loom especially large in HMTA enforcement, either. In each enforcement unit except USCG, the prosecution function is concentrated in the hands of a few attorneys located at the agency's headquarters. Frequent interaction among these attorneys probably maintains decisional consistency at a fairly high level. USCG, by contrast, has decentralized the penalty-assessment function to its ten district offices. One would expect quality control to be a more serious problem in the USCG than in the other four agencies. Statistical analysis of internal decisional

328. Id. at 30, 37.

329. See Diver, A Theory of Regulatory Enforcement, 28 Pub. Policy 257, 266 (1980).

330. See HMTA Penalty Study, supra note 318, at 33.

331. For a general account of this phenomenon, see Diver, supra note 329, at 280-91.

consistency conducted for the Department's General Counsel in 1980 strongly supports this intuition. (332)

Nor do clearer rules promise to save rulemaking costs. The agency's current investment in penalty-severity rulemaking is virtually zero since it is under no legal obligation to explain the basis of its initial assessments or final settlements. An increase in the number of cases imposed after a contested hearing would undoubtedly magnify the explanatory burden, but only modestly in view of the extreme judicial deference customarily extended to administrative sanctioning decisions. (333)

Penalty standards might plausibly enhance compliance with the substantive rules by more clearly communicating the consequences of their violation. This hypothesis is debatable even in principle, since the deterrent effect of uncertainty depends on whether the regulated population is risk averse or risk preferring. (334) If, as some assert, (335) modern businessmen are inherently risk averse, uncertainty could enhance deterrent impact. The pursuit of general deterrence in this context is itself controversial. Agency officials believe that most violations result from ignorance or carelessness, especially by low-level employees of carriers and shippers. (336) The cost of effectively monitoring and controlling their conduct may often exceed any plausible estimate of the expected cost of a first-time violation.

-
332. See HMTA Penalty Study, supra note 318, at 45-48, 53-55, 58-61. The study found a high degree of internal variation in the FAA's assessments as well. But the FAA had employed a decentralized procedure for a portion of the study period.
333. E.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1975); Nowicki v. United States, 536 F.2d 1171 (7th Cir. 1976).
334. See Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435, 1472-73 (1979).
335. E.g., Breit & Elzinga, Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis, 86 Harv. L. Rev. 693, 704-706 (1973).
336. See HMTA Penalty Study, supra note 318, Appendix D, at 4.

Even if one accepts the premise that greater certainty would enhance compliance, the incremental contribution made by penalty standards would be small. The probability of detection and punishment is, for most regulated firms, very small and highly uncertain. (337) Similarly, the potential nonpenalty costs of committing an HMTA violation--such as potential tort liability for a resulting mishap--are subject to highly unpredictable odds and magnitudes. Estimating the total predicted cost--magnitude times probability for each adverse consequence--of a potential violation is thus enveloped in a fog of uncertainty that even a perfectly transparent penalty formula would barely penetrate.

The greatest source of resistance to policy clarification here, however, seems to be concern for incongruity. Agency prosecutorial personnel have steadfastly maintained that bright-line rules would impair their ability to tailor the sanction to the precise circumstances of the offense and the offender. (338) This position has much force. Discretion at the remedial stage is often a safety valve for the overinclusiveness of substantive rules. (339) It manifestly serves that function in this instance. In their single-minded pursuit of objectivity, the Department's primary rules inevitably sweep large categories of harmless or beneficial conduct into the prohibited zone. Enforcement discretion enables the Department to respond to legitimate contextual considerations--such as the location, size, and other contents of the shipment, the degree of personal culpability or corporate neglect, and the numbers of people exposed--that determine the hazard presented by an individual violation.

Articulated penalty standards could also undermine the corrective function of enforcement by impeding adjustment to peculiarities of the offender's situation. Sometimes a heavy hand is necessary to get the attention of remote or recalcitrant upper-level management, while, other times, securing a firm commitment to correct violation-breeding practices diminishes the utility of added punishment. This is not to

-
337. In 1979, DOT conducted 103,246 inspections or about one for every 884 estimated shipments. Comptroller General of the U.S., Programs for Ensuring the Safe Transportation of Hazardous Materials Need Improvement 7, 39, 57 (November 4, 1980). Only 2587 enforcement cases were actually commenced that year, *id.* at 57, and approximately 350 cases were closed with imposition of a fine. See Table I supra.
338. See HMTA Penalty Study, supra note 318, Appendix D, at 6.
339. See Diver, supra note 329, at 279; Veljanovski, Economic Aspects of the Enforcement of British Factory Legislation (draft, February, 1981).

say that more transparent penalty standards must necessarily ignore these contextual concerns, but rather that any sensible body of standards would necessarily preserve a generously open texture.

Cries of incongruity have a hollow ring, of course, if the current regime produces wildly incongruent outcomes. The evidence suggests otherwise, however. On an aggregative basis, at least, the agency's behavior seems consistent with an "efficient deterrence" model. That is, the bulk of penalty collections relate to activities--bulk shipment of highly explosive, flammable, or toxic materials by rail or highway--that generate most of the social losses from hazardous materials transportation.(340) Similarly, the reported rate of recidivism is quite low,(341) suggesting the success of the agency's "correctional" policy. Against that backdrop, the benefits from anything more than a modest elaboration of penalty criteria are unlikely to be great enough to justify the rulemaking costs and enhanced incongruity risks.

H. Bank Chartering By The Comptroller of the Currency

The Office of the Comptroller of the Currency (OCC) derives its authority to grant charters to national banks from the National Bank Act of 1864.(342) Aside from some essentially procedural requirements, the only statutory standard for bank chartering is as follows:

If...it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate....But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose

-
340. See Diver, Regulatory Plea-Bargaining: A Case Study of the Enforcement of the Hazardous Materials Transportation Act (paper presented at the 1981 Annual Meeting of the American Political Science Ass'n, New York, September 3-6, 1981), at 9-11.
341. HMTA Penalty Study, supra note 318, at 23, 28.
342. Act of June 3, 1864, ch. 106, 13 Stat. 99, codified in relevant part at 12 U.S.C. §§21-27 (1980).

that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter. (343)

After an initial decade of restrictive chartering, Comptrollers adopted an "automatic approval" policy, granting charters to any applicant that met the minimum legal requirements. (344) A rash of bank failures in the 1890's and the Panic of 1907 convinced Comptrollers to begin tightening the reins in order to prevent "overbanking." Bank chartering became especially restrictive as the number of bank failures increased in the late 1920's and early 1930's. (345) Under the rubric of promoting the "needs and convenience of the community," Comptrollers maintained a vigilant watch at the gates to ward off the spectre of destructive competition. Although some recent comptrollers have loosened their grip, the principle of discretionary control over entry has become enshrined in banking regulation.

The charter approval process is procedurally informal and organizationally centralized. (346) The applicant's organizers, usually following a preliminary meeting with a regional OCC

343. 12 U.S.C. §27 (1980). The Federal Deposit Insurance Act of 1935, 12 U.S.C. §1816 (1980), augmented this sparse language modestly. Since national banks must have deposit insurance, a charter applicant must satisfy the Act's standard for insurability. But this "standard" merely enumerates six factors to be considered by the Comptroller: The financial history and condition of the bank, the adequacy of its captial structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purpose of this chapter.

344. J. White, Banking Law 406-07 (1976).

345. Majority Staff Study on Chartering of National Banks: 1970-1977, Sen. Comm. on Banking, Housing and Urban Affairs, 96th Cong. 2d Sess. 5-6 (1980) [hereinafter cited as Staff Study].

346. For descriptions of the process see Scott, In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies, 42 U. Chi. L. Rev. 235 (1975); Staff Study, supra note 345, at 11-28.

official, file an application form requiring detailed information on the proposed bank's capitalization, primary service area (geographical, economic, and demographic data), competition, services, facilities, operating income projections, and principals' backgrounds.(347) The regional office then assigns a bank examiner to conduct a field investigation of the same matters and to prepare a confidential report and recommendation.(348) The regional administrator appends his own comments and recommendation and forwards the file to OCC headquarters, where it is subjected to sequential review by staff analysts and administrators. Until quite recently,(349) the Comptroller personally made the final decision, either rejecting the application or granting preliminary approval. Following preliminary approval the applicant has 18 months to raise capital and appoint a chief executive officer. The applicant must then secure final approval before commencing operations.

Throughout most of the program's history, Comptrollers have made very little effort to confine their statutory discretion by articulating more precise criteria for chartering decisions. Virtually no "common law" of bank chartering has evolved, since Comptrollers very rarely explained their decisions and even then, provided only extremely "curt" explanations.(350) Prior to 1976, the Comptroller's published regulations provided precious little additional detail. The rules merely listed five factors that must be investigated as part of a bank chartering case:

- (1) The adequacy of the proposed bank's capital structure.
- (2) The earning prospects of the proposed bank.

347. The forms are listed at 12 C.F.R. §5.20(i) (1980). For the 1976 version, see Staff Study, supra note 345, at 158-87.

348. See id. at 188-200.

349. The Comptroller has recently delegated authority to approve charter applications to two Deputy Comptrollers. In other respects the process is still essentially the same as described in the text. Letters from Steven J. Weiss, Deputy Comptroller for Bank Organization and Structure, OCC, to Jeffrey S. Lubbers, Acting Research Director, ACUS, August 19, 1982. Interim bank charters issued in connection with corporate reorganizations are approved by Regional Administrators.

350. Scott, supra note 346, at 261-68.

- (3) The convenience and needs of the community to be served by the proposed bank.
- (4) The character and general standing in the community or [sic] the applicants, prospective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank.
- (5) The banking ability and experience of proposed officers and other employees. (351)

This list provided virtually no independent guidance since it largely tracked the language of the Federal Deposit Insurance Act.(352) The source of greatest guidance was the application form itself which, in its numerous detailed questions, suggested more exhaustively the factors relevant to the decision. None of these sources, however, gave even a hint about the method of evaluating or combining the several factors into a decision.

This state of extreme regulatory opacity led Professor Kenneth Scott, in his 1975 study, to criticize the Comptroller for failing to "provide a clear and consistent explanation of what he is doing." (353) Based on his report the Administrative Conference of the United States recommended that the bank chartering agencies, including OCC, "undertake to provide a full statement of their objectives in approving or denying applications for charters ...and ...define in concrete terms the standards to be applied." (354) The preferred method for articulating policy, the Conference suggested, was "adoption of policy statements and rules of general applicability." (355)

351. 12 C.F.R. §4.2(b) (1974).

352. See note 343, supra.

353. Scott, supra note 346, at 268.

354. ACUS Recommendation 75-1(1), 1 C.F.R. §305.75-1(1) (1977).

355. Id.

On June 4, 1976, the Comptroller published in the Federal Register a document entitled "Policy Statements on Corporate Activities," setting forth OCC's policies governing bank charters and other actions.(356) They began on a decidedly cautious note:

The policy statements are intended to be applicable in the large majority of the decisions. However, the Comptroller may depart from these policies when he deems it appropriate to do so. Normally, the reasons for any such departure will be explained.(357)

With that caveat, the Comptroller announced an overarching policy goal ("to maintain a sound national banking system without placing undue restraint upon entry into that system") and several subsidiary desiderata (to avoid chartering "so many banks that none can grow to a size sufficient to offer a full range of needed services," to "admit only those qualified applicants that can be economically supported and profitably operated," and to protect the "viability of a newly chartered independent bank"). The policy statement went on to enumerate four "banking factors" ("income and expenses," "management," "stock distribution," and "capital"), five "market factors" ("economic condition and growth potential," "primary service area," "location," "population," and "financial institutions"), and several "other factors" to be considered in evaluating an application.

As a contribution to regulatory precision, the policy statement's impact was modest at best. It unquestionably relieved the starkness of the Comptroller's previous unelaborated list of factors. Indeed, the 1976 guidelines occasionally approached the use of bright-line tests (for example, the "general" ten percent limit on stock ownership by any one shareholder, the requirement that a "majority of the stock" be issued to local interests, capitalization "normally" not less than \$1,000,000 and sufficient for three years' operation). But the guidelines expressed most decisionally relevant factors with a good deal less precision. Criteria for evaluating the qualifications of organizers and directors for example, were still expressed in exclusively conclusory terms ("reputations evidencing honesty and integrity," "employment and business histories demonstrating success,"

356. 41 Fed. Reg. 47964 (1976).

357. Id.

"responsible in financial affairs").(358) Criteria relating to "overbanking" (usually captured under the rubrics of "need" and "profitability") were even more obtusely phrased. The most concrete provision relating to "need" is the blanket prohibition against chartering a new bank that "would threaten the viability of a newly chartered independent bank." The statement leaves one to guess what "viability" means and how serious a "threat" is necessary. Since this protection will not "typically" exceed one year, however, the cost of this opacity is mitigated.

Beyond protection of new independents, the statement's only contributions to clarification of the "need" factor are: 1) the laundry list of "market factors," 2) the expressed intent to balance competition and soundness; and 3) the constraint that "it is not in the public interest to charter so many banks that none can grow to a size sufficient to offer a full range of needed services." These provisions provide precious little guidance to applicants, challengers, or decisionmakers on either the degree to which charter policy would be used to protect incumbents (other than infant independents) from competitive injury and the compensating benefits of new entry that might override injury to incumbents. A fortiori, the guidelines say nothing about how OCC intended to measure such injury or benefits.

The 1976 guidelines are equally inarticulate on the subject of the applicant's future profitability. They require the applicant to prepare "realistic" projections of income and expenses and to document the "economic condition or growth potential" of the market, but they offer no guidance on how to measure or combine the various enumerated "market factors" into a reliable profitability projection. Nor, indeed, do they even indicate what "economically supported and profitably operated" mean.

-
358. It may be that these terms are well enough understood to narrow the range of dispute to trivial dimensions. Some support for this assessment may be derived from the findings of the Senate staff study that "organizer/management problems" alone accounted for only 6.8 percent of charter denials between 1970-1977. But this factor was involved jointly with "inadequate need" in another 24.5 percent of denials. And denial rate figures may understate the importance of this issue, given the apparent willingness of applicants to replace persons found objectionable by OCC. Staff Study, supra note 345, at 31.

The 1976 policy statement did not still OCC's critics. Although an Administrative Conference staff report eulogized the policy statement as a "work of art to be envied by federal regulation writers,"(359) Professor Scott viewed the statement as a "modest baby step in the right direction, but in no sense do they implement the intent of the recommendation."(360) A majority staff study for the Senate Banking Committee concluded in 1980, moreover, that: "OCC's reliance on vague chartering standards...have exposed the chartering process to charges of favoritism and arbitrary decisionmaking."(361) The study relied on the high rate of disagreement among internal OCC reviewers and alleged inconsistencies in handling specific cases to support its characterization.(362) Finding OCC's economic projections to have been far off the mark in several case studies, the staff study concluded that the "community need" criterion "is a poor indicator of a new bank's likely prospects"(363) and proposed greater reliance on organizer-management factors.

On October 15, 1980, almost simultaneously with release of the staff report, the Comptroller issued a revised policy statement. While the statement speaks of "clarifying" previous policy and "facilitat[ing] applicant and public understanding"(364) its principal function was to articulate a policy shift toward a more competitive bank entry policy. The Senate study had criticized OCC for adopting an excessively "restrictive" entry policy.(365) And in the Depository Institutions Deregulation and Monetary Control Act of 1980,(366) enacted earlier that year, Congress had evinced a generally procompetitive attitude toward banking.

-
359. William Bush, Licensing Decisions of Federal Banking Agencies -- An Update 8 (ACUS Staff Study, 1977).
360. Quoted in id. at 9.
361. Staff Study, supra note 345, at iv.
362. Id. at 18-19, 33.
363. Id. at 55.
364. 45 Fed. Reg. 68603 (1980).
365. Staff Study, supra note 345, at iii, iv.
366. Pub. L. 96-221, 94 Stat. 132.

The following passage from the 1980 policy statement summarizes this philosophical shift:

[I]t is the policy of the Office to foster competition through the chartering of national banks proposed by organizers and proposed directors (hereinafter, "the organizing group") whose experience and resources, plans for establishing and operating a bank (hereinafter, "the operating plan"), financial strength, competency and honesty indicate that, within the context of the economic and competitive conditions in the market to be served, the proposed bank will have a reasonable likelihood of success and will be operated in a safe and sound manner. It is not the policy of the office to ensure that a proposal is without risk nor to protect existing competitors from the competition a new bank will provide.(367)

Aside from this general statement, the philosophical shift is reflected primarily by the absence of any provisions concerning protection of incumbent banks.

As an exercise in policy "clarification" (as opposed to substantive revision), however, the impact of the 1980 statement is muddier. The sheer volume of words has increased since 1976. And some of those words provide greater "clarity." For example, the new rule suggests a time dimension for the "profitability" test, by noting that "most successful new banks are profitable, on a yearly basis, between the second and fourth years of business."(368) And the new rules, by noting that "deficiencies in one factor may be compensated for by strengths in one or more of the other factors,"(369) resolve a central ambiguity in earlier formulations: namely, whether each decisional factor was an absolute eligibility test or merely a part of one overall balancing test.

These contributions to verbal transparency are balanced by several moves in the opposite direction. For example, the rules have eliminated most of the 1976 per se rules relating to stock ownership and capitalization. Whether these changes achieve their

367. 12 C.F.R. §5.20(c) (1981).

368. Id. §5.20(c)(3)(i) (1981).

369. Id. §5.20(c)(1)(i).

stated purposes -- "to minimize unwarranted government intervention and to promote competition" (370) -- remains to be seen. The vague rule-of-reason language that replaced them (such as "sufficient" capital(371) and "wide distribution of stock"(372)) seems as consistent with a restrictive as a competitive entry policy. In summary, the 1980 rules, while signaling an important substantive shift toward freer entry, do not advance the cause of regulatory precision. Although they will undoubtedly reassure potential entrants that their chances of success, as a group, are better than before,(373) they provide little incremental guidance to any particular applicant on how to improve its odds.

The circumstances surrounding bank chartering predict a low degree of transparency in the substantive standards. First, the likelihood that per se rules will produce costly incongruities seems high, if one assumes -- as Comptrollers emphatically have -- that the overriding purpose of entry restrictions is to maintain public confidence in the banking system by reducing the risk of failure. The likelihood that new entry will cause injury -- either through the entrant's failure or by weakening an incumbent -- plausibly seems to depend on a host of variables relating to the entrant's capabilities, its competitors' positions, and market conditions. These factors will vary widely from market to market and, as the history of chartering seems to indicate, can change markedly with shifts in economic conditions.(374)

-
370. 45 Fed. Reg. 68604 (1980).
371. 12 C.F.R. §5.20 (c)(3)(iii) (1981).
372. Id. §5.20(c)(3)(iv)(B) (1981).
373. Statistics on the Comptroller's charter approval rate show that this policy shift had occurred well before issuance of the 1980 policy statement. The approval rate, which had fallen below 50 percent in 1976 and 1977, shot up to 75 percent in 1978, 81 percent in 1979, and 88 percent in 1980. See 1980 OCC Ann. Rep. 240; 1979 id. at 11; 1978 id. at 11; 1977 id. at 7.
374. For example, the charter approval rate has fluctuated dramatically from lows of 18 percent in 1965 and 1967, up to a high of 66 percent in 1973, then down to a low of 45 percent in 1977, and again dramatically upward since then. See 1965-1966 OCC Ann. Rep. 22; 1967 id. at 8; 1973 id. at 5; and note 373 supra.

The compliance-encouraging function of rule precision seems largely irrelevant here. Chartering standards are not, at base, aimed at modifying behavior. They are, rather, almost purely status-recognition rules whose function is to select applicants who can meet certain minimal character, experience, and financial qualifications and demonstrate some minimal quantum of community "need." It is true, of course, that the relative clarity of standards may influence the rate of applications and, consequently, the rate of entry. More precise criteria, by reducing uncertainty, might encourage applications from those otherwise dissuaded by the high costs of compiling the necessary economic data. During a time of perceived inadequacy of banking services, this factor might exert a stronger pull toward greater transparency. The evidence does not support this thesis, however, since the 1976 policy statement -- the high water mark of OCC charter rule precision -- is far more protectionist in tone than the 1980 rules, and was issued by a Comptroller (Smith) whose charter approval rates were the lowest in the decade.(375) Furthermore, Comptrollers who wish to encourage new entry can often encourage applications far more effectively by their actions than their words,(376) and more efficiently by making procompetitive public statements than by issuing rule changes.(377)

Neither do transaction costs present a very powerful case for a high degree of precision. Rule-application costs are not substantial. The Comptroller received, on average, only about 120 formal charter applications per year during the 1970's. The process for deciding cases is highly informal, consisting usually of only a field examination and several internal reviews. While organizers often have a sufficient stake in the outcome to demand far more expensive procedures, the courts and Congress have resisted pressures to impose them.(378) The availability of an opportunity to reapply or to seek entry into banking through the state regulatory system undoubtedly mitigates those pressures.

375. See notes 373 and 374 supra.

376. During the past 20 years there has been a close correlation between changes in the charter approval rate and changes in the volume of applications. The direction of the casual relation, if any, is not clear.

377. For an asserted illustration, see Staff Study, supra note 345, at 7-8 (Comptroller James Saxon, at the beginning of his tenure in 1962-1963).

378. See Scott, supra note 346.

Furthermore, the decisionmaking process is highly centralized. Even after receiving blanket legislative authority in 1980 to subdelegate any power vested in his office by law (379) the Comptroller maintained fairly tight central control over chartering decisions.(380) This tight central control over the chartering process substantially reduces the need, found in many other programs, to use clear rules to control agency decisionmakers.

The rulemaking cost factor also cuts against increased clarity. If my earlier assertions about the risks of incongruity are correct, the cost of developing a transparent, yet congruent rule would be quite high. Preliminary efforts by staff economists to produce more rigorous models for predicting economic impact have been discouraging.(381) Nor does the Comptroller face the usual trade-off between ex ante and ex post policymaking costs to the same degree as other agencies, in view of the informality of the charter decisionmaking process and the minimal explanation for rejections demanded by reviewing courts.

In sum, the degree of precision with which Comptrollers have articulated charter policy, especially since 1976, seems fully consistent with the context in which they have operated. This is not to say that the substantive policy assumptions on which entry regulation rests are necessarily correct or sensible. They have been attacked fiercely in recent years and show signs of yielding. Nor is the extreme procedural informality characteristic of banking regulation necessarily defensible. But within the context of a system built on those substantive assumptions and implemented with that procedural informality, a substantial increase in charter rule precision would probably not produce benefits justifying its cost.

I. Comparative Renewal Broadcast Licensing Standards

The standards employed by the Federal Communications Commission (FCC) to select among competing applicants for a broadcast license, especially if one of them is an incumbent licensee seeking renewal, have long been regarded as a paragon of

379. 12 U.S.C. §4a (Supp. 1981).

380. See 12 C.F.R. §5.3 (1981), and note 349, supra.

381. Interview with John Shockey, former OCC General Counsel in Washington, D.C. (January 10, 1981).

administrative opacity.(382) Despite countless proposals and several major efforts at reform, this body of standards has stubbornly resisted significant clarification.

The Federal Communications Act, embellished by FCC rules, articulates relatively transparent threshold criteria that specify minimal citizenship, financial, and technical qualifications for a broadcast license.(383) These include, for example, bright-line regulatory restrictions on joint ownership of other broadcast licenses or co-located newspapers(384) that have been judicially sustained against fierce attacks on their alleged incongruence.(385)

It is in the area of selecting among competing applicants who satisfy these threshold criteria that the FCC has been beset by such celebrated inarticulateness. Its 1965 Policy Statement represents a major effort to achieve "a high degree of consistency

382. See, e.g., Jaffe, *The Scandal in TV Licensing*, Harper's, Sept. 1957, at 77, 79; Schwartz, *Comparative Television and the Chancellor's Foot*, 47 *Geo. L.J.* 655 (1959); H. Friendly, *The Federal Administrative Agencies* 70-73 (1962); Jaffe, WHDH: The FCC and Broadcasting License Renewals, 82 *Harv. L. Rev.* 1693 (1969); Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 *Stan. L. Rev.* 1 (1971); Botein, *Comparative Broadcast Licensing Procedures and the Rule of Law: A Fuller Investigation*, 6 *Ca. L. Rev.* 743 (1972); Geller, *the Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 *Va. L. Rev.* 471 (1975); Brinkmann, *The Policy Paralysis in WESH: A Conflict Between Structure and Operations in the FCC Comparative Renewal Process*, 32 *Fed. Comm. L.J.* 55 (1980).
383. See 47 U.S.C. § 310 (1980); 47 C.F.R. Part 73 (1981). The statutory standard for determining whether to grant an application to an applicant meeting these threshold criteria--unchanged since passage of the Communications Act in 1934--is "public interest, convenience, and necessity." 47 U.S.C. § 309(a) (1980).
384. 47 C.F.R. §§ 73.35, 73.240, 73.636 (1981).
385. See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 773 (1978); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

of decision and of clarity in our basic policies" regarding selection among competitors for an initial broadcastlicense.(386) On the surface, the Statement made only modest progress toward those objectives, since it merely enumerated seven factors to be considered--"diversification of control of the media of mass communications, full-time participation in station operation by owners, proposed program service, past broadcast record, efficient use of frequency, character, and other factors"--each of them defined in highly open-ended terms. The Policy Statement did, however, convey some information about the manner of evaluating the factors and the relative weights to be accorded the factors. For example, the statement described diversification as "a factor of primary significance"(387) and full-time participation as a factor of substantial importance".(388) The other factors were expected to be significant only in relatively exceptional cases.(389)

However modest the 1965 Policy Statement's contributions to "clarity," they appear momentous when compared with the FCC's policy on comparative selection in renewal cases. Once the desirable frequencies had been fully allocated and assigned, the major avenue for entry into broadcasting became challenges to the renewal of incumbents' licenses. This fact, plus the enormous financial stakes in major market broadcasting, focused great attention on the comparative renewal process.

Before 1970, one had only a handful of administrative orders in comparative renewal cases from which to glean the FCC's policy.(390) Although these opinions were hardly a model of

-
386. Public Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 393 (1965).
387. Id. at 394.
388. Id. at 395.
389. For example, "[d]ecisional significance will be accorded only to material and substantial differences between applicants' proposed program plans" (id. at 397); "[a] past [broadcast] record within the bounds of average performance will be disregarded" (id. at 398).
390. Hearst Radio, Inc. (WBAL), 15 F.C.C. 1149 (1951); Seven (7) League Productions, Inc. (WIII), 1 F.C.C.2d 1597 (1965); RKO General, Inc. (KHJ-TV), 5 F.C.C.2d 517 (1966); WHDH, Inc., 16 F.C.C.2d 1 (1969), 17 F.C.C.2d 856 (1969), aff'd sub nom, Greater Boston Television Corp. v. F.C.C., 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

clarity, they seemed to stand for the proposition that past performance by the incumbent and continuation of existing service were the paramount concerns.

In a 1970 Policy Statement the FCC made an effort to "contribute to clarity of our policies" by setting forth its standard to govern the selection process in contested renewal cases.(391) The Policy Statement, which purported to codify existing practice, identified the incumbent's "past record" in the "last license term" as the critical factor.(392) If the incumbent's broadcast service had been "substantially attuned to meeting the needs and interests of its area" and free of "serious deficiencies," renewal would be granted without regard to the quality of the challenger's application.(393) If not, the agency would weigh the comparative merits of the competing proposals, favoring a promising challenger.

Displaying its inexhaustible capacity for understatement, the FCC conceded that its standards "lack mathematical precision."(394) Nonetheless, they would have simplified matters to a degree by focusing attention--at the initial stage at least--on only the one "factor" of the incumbent's past record. The heavy weight placed on this factor, however, highlighted its hopeless vagueness,(395) and shortly after issuing the Policy Statement the FCC opened Docket 19154 to develop "some pertinent standards" to define "substantial service."(396) In its Notice of Inquiry, the FCC specifically requested comments on a proposed set of mathematical guidelines for the minimal amount of broadcast time (expressed as a percentage of total on-air time and of prime

-
391. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 424 (1970).
392. Id. at 427.
393. Id. at 425.
394. Id. at 426.
395. The Policy Statement's only effort to clarify its criteria was a forlorn list of equally uninformative synonyms for "substantial" and "minimal" quoted from Webster's Dictionary. Id. at 426.
396. Notice of Inquiry, In the Matter of Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 27 F.C.C.2d 580, 580 (1971).

time) to be devoted to "local programming," "news," and "public affairs." (397) The proposal also offered financial criteria for ascertaining the guideline figure applicable to a particular station. Although the proposal did not attempt to define the three programming categories and was careful to treat the standards only as "prima facie indications of substantial service," (398) the proposal certainly represented a quantum leap in transparency.

The ink was scarcely dry on the Notice of Inquiry when the D.C. Circuit invalidated the 1970 Policy Statement because it effectively denied challengers the "full comparative hearing" guaranteed by the Communications Act, (399) as interpreted in the Ashbacker case. (400) The FCC, seizing on the court's dictum that "superior performance should be a plus of major significance" (401) and its invitation to the FCC to "clarify in both quantitative and qualitative terms what constitutes superior service" in rulemaking, (402) interpreted the decision to "reinforce" the need for the undertaking embraced within Docket 19154. (403) Conceding that it could no longer exclude the diversification issue from comparative cases, the FCC expressed the opinion that it would be "impossible to formulate any general standard" with respect to diversification. (404) The only reason offered for this conclusion

-
397. Id. at 582.
398. Id. at 583.
399. Citizens Communication Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).
400. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), discussed at 447 F.2d 1210-12.
401. 447 F.2d at 1213 (emphasis original). The Court attempted to clarify these comments in a supplementary opinion at 463 F.2d 822, 823 (1972).
402. 447 F.2d at 1213 n. 35.
403. Further Notice of Inquiry, 31 F.C.C.2d 443, 443 (1971).
404. Id. at 445.

was that the "matter turns upon the facts." (405)

Despite the receipt of numerous comments and the issuance of two further notices of inquiry in 1973, (406) it was not until March 9, 1977, that the Commission issued a Report and Order finally disposing of Docket 19154 by concluding that quantitative program standards should not be adopted. (407) To the extent that the Order contains any affirmative statement of the renewal standard, it is perhaps this:

[T]he renewal applicant must . . . continue to run on its record, and we believe that that record should be measured by the degree to which the licensee's program performance was sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal. Where the renewal applicant has served the public interest in such a substantial fashion, it will be entitled to the "legitimate renewal expectancy" clearly "implicit in the structure of the [Communications] Act." . . . Thereafter, we will direct our attention to the comparative factors set forth in the 1965 Policy Statement. . . . While that policy statement will otherwise govern the introduction of evidence in the comparative renewal proceeding, the weight to be

-
405. Id. The Commission did repeat an earlier assertion that any effort at "overall restructuring" of industry ownership patterns should be accomplished by rulemaking. Id. at 445 (echoing a point made in the 1970 Policy Statement, 22 F.C.C.2d at 427-28). But it is apparent from its emphasis on the term "overall" as well as its subsequent behavior (see, e.g., Multiple Ownership of Standard, F.M., and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975)), that the F.C.C. referred here to threshold qualifications standards for multiple or joint ownership, not complete criteria for defining the content and weight of the diversification factor in comparative hearings.
406. Second Further Notice of Inquiry, 43 F.C.C.2d 367 (1973); Third Further Notice of Inquiry, 43 F.C.C.2d 1043 (1973).
407. Report and Order, 66 F.C.C.2d 419 (1977), aff'd sub nom. National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978).

accorded the legitimate renewal expectancy of the incumbent licensee and the significance of other comparative considerations will depend on the facts of the particular case.(408)

This "standard" is, to say the least, opaque. Its application in the celebrated Cowles case(409) demonstrates its almost infinite elasticity. There, the FCC managed to renew the incumbent's television station license by finding its "superior" past performance(410) sufficiently weighty to overcome its opponent's apparent advantage in the character, diversification, and integration categories. The Commission made these apparent advantages disappear with a series of rapid gestures that a professional magician would envy. But the beauty of its performance was apparently lost on the D.C. Circuit, which rejected the FCC's reasoning as "completely opaque to judicial review, fall[ing] somewhere on the distant side of arbitrary."(411)

Undaunted, the FCC returned to the drafting table and concocted a new rationale for the same result.(412) This opinion more candidly conceded to the challenger advantages on the standard comparative criteria and devalued the incumbent's past broadcast record from "superior" to "substantial." But this didn't prevent the Commission's magical scoreboard from once again declaring the incumbent the winner. A weary Court of Appeals finally threw in the towel,(413) and another renewal challenge had

-
408. 66 F.C.C.2d at 430, citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).
409. Cowles Florida Broadcasting, Inc. (WESH-TV), 60 F.C.C.2d 372 (1976), rev'd sub nom. Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 50 (D.C. Cir. 1978), petition for cert. dismissed, 441 U.S. 959 (1979), reinstated, 86 F.C.C.2d 993 (1981); aff'd, 683 F.2d 503 (D.C. Cir. 1982).
410. One of the more amusing ironies in the Commission's tortured reasoning was its rejection of the Administrative Law Judge's label for the incumbent's past performance ("thoroughly acceptable") as "too vague to be meaningful." 60 F.C.C.2d at 417.
411. 598 F.2d at 50.
412. 86 F.C.C.2d at 1006-18.
413. 683 F.2d 503 (D.C. Cir. 1982).

been successfully beaten back. While the case was on appeal, however, the FCC launched yet another inquiry into the feasibility of prescribing more concrete renewal standards.(414) But the wistful tone of the Notice's plea for inspiration and its open hostility to quantitative standards counsel little optimism. And in its two most recent comparative renewal cases, the FCC has intoned its familiar mumbo-jumbo.(415)

What accounts for this steadfast adherence to extreme opacity, in the face of recurrent external criticism and internal calls for reform? The Commission's own words provide some explanation for its refusal to adopt particular verbal formulations. In its Report and Order terminating Docket 19154, for example, the Commission invokes congruence, compliance, and transaction cost concerns. "Increasing the amount of [favored] programming," it argued at one point, "would not necessarily improve the service a station provides its audience."(416) Licensees might simply "spread their resources thinner" or focus on trivial issues (the Commission's illustration is "canoe safety").(417) The FCC found, in short, no necessary congruence between a quantitative criterion and the underlying goal of responsiveness to "community problems, needs, and interests."(418) Similarly, while the Commission assumed a high rate of incumbent compliance with quantitative guidelines,(419) it expressed doubt that the guidelines would reduce uncertainty enough to "simplify the hearing process" or "offer a licensee any real assurance of renewal."(420)

-
414. Notice of Inquiry, Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 88 F.C.C.2d (no. 2) (1981) at 21.
415. Radio Station WABZ, Inc., _____ F.C.C.2d _____ (1982) (FCC 82-314); Simon Geller, 90 F.C.C.2d 250 (1982).
416. 66 F.C.C.2d at 427.
417. Id. at 428. The illustration betrays the hopeless subjectivity of the Commission's underlying policy views. One can easily imagine a locality in which a sizable audience cares intensely about canoe safety.
418. Id.
419. 66 F.C.C.2d at 427 ("we believe that almost all licensees would adopt our standards of substantial performance as their own minimum standards. . .").
420. Id. at 429.

Although the Commission was somewhat less articulate about its reasons for preferring the more opaque functional formulation of diversification and integration criteria, a concern for congruence apparently carried the day. The Commission feared that application of structural criteria--however predictable and easy to administer--would reduce program quality by destabilizing the broadcast industry and ousting experienced incumbents in favor of rank novices. (421)

Arguments like these may explain the rejection of the particular formulations at issue. But these few formulations surely do not exhaust the possibilities for a more transparent standard. Several other approaches, or elements of an approach, have been suggested, such as Robert Anthony's algebraic formula, (422) Judge Leventhal's lottery, (423) Commissioner Robinson's auction, (424) Commissioners Hooks' and Fogarty's checklist, (425) or the D.C. Circuit's "excessive and loud advertising" and profit reinvestment suggestions. (426) The interesting question is not so much why the Commission has failed to adopt any one of these proposals, but why it has been so completely incapable of adopting any more transparent formulation. The record supports Commissioner Robinson's frustrated conclusion that it simply cannot be done. (427)

Using our rudimentary cost-benefit framework, one could construct a plausible defense of the FCC's performance. For example, one could point to the enormous variety of local "community

-
421. See, e.g., 22 F.C.C.2d at 427-28.
422. Anthony, supra note 382.
423. Star Television, Inc. v. FCC, 416 F.2d 1086, 1089, 1094-95 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969) (Leventhal J., dissenting).
424. Cowles Florida Broadcasting, Inc. (WESH-TV), 60 F.C.C. 2d at 435, 444-48 (Robinson, Comm'r, dissenting). The FCC has recently rejected the lottery option. Random Selection--Lottery Systems, 89 F.C.C.2d 257 (1982).
425. Report and Order (Docket No. 19154), 66 F.C.C.2d at 433, 438 (separate statement of Comm'rs Hooks & Fogarty).
426. Citizens Communication Center v. FCC 447 F.2d 1201, 1213 n. 35 (D.C. Cir. 1971).
427. Cowles Florida Broadcasting, Inc. (WESH-TV), 60 F.C.C.2d at 443-44

needs and interests" and the consequent high risk of incongruence posed by any uniform standard. One could further invoke First Amendment values to attach a very high social value to each increment of broadcast speech chilled or coerced by an incongruent rule. One could minimize the compliance function of transparent rules here by noting licensees' enormous built-in incentive to comply with FCC policies (however inscrutable). Similarly, one could depreciate the enforcement costs argument by pointing out the relative infrequency of comparative renewal challenges.(428)

There are, of course, countervailing arguments. Transaction (hearing) costs per case are very high, reflecting not only the life-and-death quality of license renewal decisions generally, but the enormous profitability of the broadcasting industry in particular.(429) The relative infrequency of contests, one might add, may be largely a result of the very regulatory opacity whose justifiability is the issue. An important conduct-regulating function of renewal standards is to "spur" potential competitors to challenge mediocre incumbents.(430) The spur of competition may well depend for its operation on the clarity of the selection criteria articulated. Few potential entrants will risk the substantial investment in mounting a renewal challenge without some reliable basis for estimating the odds of success. Obscure rules can thus defeat public service goals by insulating incumbents from challenge. The infrequency of renewal challenges, despite the consistently high rates of return in the industry, suggests that opacity may have had precisely this effect.(431)

The task of weighing competing arguments in support of or opposition to any particular policy formulation, never easy, is rendered impossible here, I believe, by a single factor that simply overwhelms the rest of the analysis: goal ambiguity. The political

-
428. From 1961 through 1978, there were 17 comparative television hearings and 30 comparative radio hearings. *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 58, 61 (D.C. Cir. 1978) (denying petition for rehearing *per curiam*).
429. See *Cowles Florida Broadcasting, Inc. (WESH-TV)*, 60 F.C.C.2d at 435 (Robinson, Comm'r, dissenting).
430. Policy Statement, 22 F.C.C.2d 424, 424-25 (1970).
431. An even better explanation, however, is the content of the FCC's de facto renewal policy: namely, the incumbent (almost) always wins. See *Cowles Florida Broadcasting, Inc. (WESH-TV)*, 60 F.C.C.2d at 435, 442 (Robinson, Comm'r, dissenting).

system in this country has simply been unable to achieve anything resembling consensus on the meaning of "good" performance in broadcasting. Views about what is wrong with broadcasting and what the government should do about it remain irreconcilably fragmented and divergent. One major reason for this may be a powerful cultural resistance to government censorship that discourages explicit public debate about how the government should go about assessing the quality of broadcast performance.(432) The result is chronic inability to reduce value conflict to manageable dimensions.

One of the more visible manifestations of this general state of goal ambiguity is the protracted conflict between the FCC and the D.C. Circuit on the subject of "renewal expectancies." A majority of the Commission, responding in large part to the hopeless intractability of the performance criterion, proposed in 1970 and again in 1977 that comparative evaluation be abandoned altogether.(433) Renewal would be automatic, at least in the absence of egregious misconduct warranting license revocation. This solution would, in effect, reconcile conflicting conceptions of the "public interest" by adopting a free-market (advertiser-sovereignty) model. The D.C. Circuit, however, has staunchly resisted this model as flatly inconsistent with the Communications Act.(434) Whatever conception or conceptions of the "public interest" may be consistent with the Act--and the judges of the D.C. Circuit furnish precious little insight into what those might be--this particular one is not.

What the Commission is doing, then, can be explained as either 1) avoiding policy choice or 2) trying to conceal a distinct, but improper policy choice from the prying eyes of reviewing courts. Either way, opacity is the predicted--if not wholly honorable--tactical response. The Commission's existing "standard" avoids any explicit elevation or subordination of politically contending values. It also provides a particularly dense smokescreen behind which it could seek to pursue a deliberate strategy of consistently

-
432. See Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 54 (D.C. Cir. 1978) (citing "First Amendment questions" raised by "inquiry into the content of programming"). Cf. Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969) (FCC must walk a "tightrope between saying too much and saying too little").
433. See Policy Statement, 22 F.C.C.2d 424 (1970); Report and Order (Docket No. 19154), 66 F.C.C.2d 419, 429 (1977).
434. See Central Florida Enterprises, Inc. v. FCC, 598 F.2d at 51.

favoring incumbents. One can assuredly criticize the Commission's inarticulateness, then, but only if one is sanguine about the prospects that the Congress or the Commission can first narrow the range of underlying value conflict.

V. RULE PRECISION: OBSERVATIONS AND RECOMMENDATIONS

A. Interagency Comparisons

The case studies reveal interesting variations among agencies with regard to both the absolute degree of verbal precision employed to express their policies and their pattern of evolution over time. The rules studied range in apparent precision from the FAA's pellucid criterion for pilot retirement to the FCC's opaque broadcast license renewal criteria and the DOT's virtually nonexistent HMTA penalty standards. Most formulations fall between these extremes, exhibiting a mixture of relatively transparent and relatively obscure features -- the sharpness of SSA's medical and vocational appendices and the bluntness of its "equivalency" criterion; the mysterious nonexclusivity of SEC's well-charted "safe harbor." The mix of opaque and transparent elements varies from rule to rule. OCC's bank chartering rules contain very few bright-line tests among its fuzzily defined and essentially unweighted factors. The Parole Board combines highly objective factors into a tight matrix, but then constrains permitted outcomes only loosely by an arithmetic range with a verbally unguided escape hatch. The Labor Department clearly lights the employer's path through recruitment and wage determination, but leaves the hiring decision largely in the shadows. If nothing else, the nine case studies attest to the variety of linguistic structures available for accommodating the age-old conflict between certainty and flexibility.

Despite the difficulty of ranking different rules with respect to degree of precision, impressionistic interagency comparisons provide some support for intuitive hypotheses about administrative rule precision. One such hypothesis is that, the more heterogeneous the conduct or conditions confronted by a rule, the less transparent a verbal formulation it will assume. The basis for this hypothesis is that complete reliance on hard-line rules will generate unacceptably large incongruity losses in such settings. The case studies provide some evidence to support this hypothesis. Although both the FAA's age-60 rule and the SSA's disability definition attempt to define the point at which a person becomes incapable to perform work, the former (applicable to a single occupation) is more transparent than the latter (applicable to all occupations). Similarly, the Labor Department's rules for certifying aliens' eligibility for domestic employment are more exact than the INS's rules for determining aliens' eligibility for domestic residence. One could even try to explain the relative precision of bank chartering and broadcast renewal rules as inversely related to the diversity of these two industries' products (and, hence, the heterogeneity of public concerns potentially implicated by their licensure). But at this point, comparative assessment of "heterogeneity" becomes awfully slippery. And the case studies seem to offer at least one counterexample: The greater precision of

parole guidelines ("sanctioning" standards for all federal crimes) than HMTA penalty standards (sanctioning standards for only one class of offenses).

A second hypothesis is that agencies with a highly decentralized enforcement process will rely more heavily on specific rules as an internal quality-assurance mechanism. The case studies provide modest support for this proposition. Of the four facially vaguest rules, three were administered in a tightly concentrated fashion (broadcast license renewal, bank chartering, and HMTA penalties). But one--change-of-status rules--involves a decentralized operation. The four most transparent rules (age 60, underwriter, labor certification, and disability) involve two agencies of each type.

A related transaction-cost hypothesis--that caseload volume and rule precision correlate--receives stronger support. At the low-caseload volume extreme--broadcast renewal, bank chartering, and HMTA penalties--one does encounter the least articulated policies. At the other pole--disability determinations--the rules are highly elaborated. But in between, the relationship is erratic (compare change-of-status, a high-volume, low-transparency regime, with age 60, low-volume, high-transparency).

Another dimension on which to compare the nine agencies is the pattern of evolution over time. Here again, one is struck by the variety. One agency (the FAA) has clung stubbornly to an extravagantly transparent rule from day one, while others (FCC, INS, and DOT) have persistently maintained opaque formulations. The other agencies studied made changes in their rules that involved major shifts in degree of verbal precision. In some (SSA and SEC), the pattern of evolution is a steady progression toward transparency and complexity. In others, after a quantum increase in both dimensions, the evolution either stalled (Parole), or showed signs of reversing (OCC and, to a lesser extent, DOL). In no agency studied has there been a pronounced move from transparency toward opacity or from complexity toward simplicity. The heavy reliance on previous ACUS studies in the selection of case studies undoubtedly biased the sample in this regard. But the hypothesis that rules will, over time, generally become more transparent and complex, is hardly novel nor surprising.

Explaining the variations among agencies is more difficult. One plausible explanation is that rule transparency will grow with caseload. Comparing the rapid growth of disability claims with the relative stability of broadcast renewal challenges and bank charter applications supports that thesis. But the INS's vague status-adjustment policies managed to survive substantial caseload expansion, and quantum leaps in the articulation of SEC and Parole Board policies occurred during times of caseload stability. Similarly, one would expect an increase in administrative

decentralization to correlate with policy articulation. This happened at the Parole Board, and to a lesser extent, at SSA. Although there are no clear counterexamples, the number of cases involving a significant change in this variable is too small to support firm conclusions.

That these various hypotheses for explaining interagency variations fare rather indifferently need not trouble us unduly. Each, first of all, focuses on the effects of only one variable at a time. In a sample so small, it is impossible to hold other variables constant. Second, each uses a simplistic proxy for a more elusive underlying variable. Caseload, for example, is only one component of enforcement cost. Procedural formality and incentive to litigate should also be factored in. Likewise, "decentralization" is an imperfect index of quality-assurance cost; and "heterogeneity," an educated stab at the monstrous complexities of estimating incongruity losses. In light of these considerations, the results of our rudimentary interagency comparison are far from disappointing.

B. Recommendations

Turning from a descriptive overview to a more prescriptive mode, one can extract several recommendations for administrative draftsmen. The most basic recommendation to emerge from this study is that administrators should think consciously about rule precision as one dimension of their "output." More specifically, and less obviously, administrative draftsmen, when confronting a choice of verbal formulations, should isolate the three dimensions that I have called "transparency," "complexity," and "congruence," and consider explicitly the tradeoffs among them implicit in making that choice. In attempting to select a formulation that makes the most favorable tradeoff, policymakers should consider the implications of their choice for: 1) the rate of compliance by the regulated population, 2) the cost of rulemaking, both *ex ante* and *ex post* (including the cost of controlling the quality of decisions made in the course of enforcing the rule), 3) the cost of applying the rule and resolving disputes about its application, and 4) the extent of divergence between the outcomes actually produced by the rule and those desired by the policymaker.

Advice expressed at so high a level of generality is probably no more useful than it is controversial. Administrative policymakers face many competing demands on scarce analytic and creative resources. Faithful adherence to such a recipe is extraordinarily demanding. Most of us would be astounded to discover that policymakers seriously attempt to quantify all the costs and benefits associated with alternative rule formulations. The computation is far too complex and uncertain to reward such an enterprise.

Rather we would expect to find policymakers making these judgments intuitively and piecemeal, successively comparing a few alternatives according to a few simple qualitative criteria, relying heavily on guesswork and trial and error. Given the high cost of more rigorously analytic methods, this sort of qualitative, incremental approach can be expected to yield optimal results in a wide range of circumstances. On occasion, however, the magnitude of the interests at stake will justify heavier investment in more systematic analysis.

Whatever the decisionmaking model appropriate for a particular context, the analysis presented here provides a number of revealing clues about the circumstances in which a particularly heavy investment in generic policy articulation is likely to be justified. Agencies should use these clues as an aid to the allocation of their scarce analytic and drafting resources, as should their potential critics in focusing their attention.

1. Compliance Rate

A major affirmative argument for regulatory precision is to promote voluntary compliance by the rule's addressees. Consequently, situations in which compliance problems loom especially large are good candidates for enhancing rule precision. The case studies suggest that these situations will have the following characteristics.

First, they will involve rules that attach legal significance to conduct rather than status. Distinguishing between conduct-regulating and status-evaluating rules is not always straightforward, since virtually all rules seek to influence behavior in some ultimate sense. The form of the rule will, however, usually serve as a helpful guide to the intensity of its compliance function. Rules that explicitly forbid (or command) particular actions are most clearly conduct-regulating. Also in this category are definitional rules that help to locate the boundary line between prohibited and permissive conduct (or between mandatory and discretionary conduct). Thus, for example, the SEC's resale rules, though nominally definitional (helping to define "underwriter"), effectively mark the limits between transactions that are permitted (exempted) by the Act and those that the Act forbids. Put another way, they effectively prescribe when registration is mandated and when it is not.

Standards for the grant of a permission or privilege, on the other hand, often fall into the status-evaluating category. A clear example is the SSA's disability definition, which makes eligibility for a valuable benefit turn on the existence of an unexpected and unwanted chronic condition. Initial licensing standards, like the OCC's bank chartering rules, typically condition eligibility for a license on the presence or absence of certain durable

characteristics (such as managerial experience and adequate capitalization) or short-range conditions beyond the applicant's immediate control (such as community "need").

This is not to say that standards for granting a benefit or privilege can never serve a behavior-inducing function. The Labor Department's criteria for granting alien labor certifications, though once based solely on status variables like occupational grouping and labor market characteristics, now expressly condition approval on certain employer conduct, in the form of a recruitment effort for domestic workers. More importantly, these rules have always served as an integral part of a general regulatory program designed to prevent employers from hiring aliens in preference to domestic workers or at wages below prevailing wage rates. Since the "status" that qualifies an employer to hire an alien -- competitive wage rate and unavailability of domestic workers -- is partially controllable by the employer, the rules have a significant conduct-inducing role.

Similarly, standards for renewal of a scarce privilege may be more likely than standards for the initial grant to have behavioral objectives. As in the case of FCC broadcast licensing, the threat of nonrenewal is a powerful inducement for complying with the regulator's wishes during the term of the license. Renewal standards may thus double as conduct-regulating and merit-rewarding standards. Criteria for redetermining disability at periodic intervals, on the other hand, have no apparent purpose other than to assure the continued existence of the status on which eligibility for benefits depends.

The regulatory function of standards for imposing sanctions also varies with context. Severity of penalty occupies a central place in the theory of general deterrence. Consequently, criteria for determining penalty severity would seem to serve an important compliance-related function. But general deterrence is only one of several functions performed by punishment, and often a relatively unimportant function. For example, the Parole Board's guidelines promote incapacitative and retributive goals as much as general deterrence. In HMTA enforcement, the emphasis is on curing the specific violation and preventing its recurrence.

The second variable on which the magnitude of the compliance factor depends is the size and sophistication of the rule's audience. An investment in verbal clarification promises to yield the largest compliance payoffs when the rule's audience is large, diverse, and remote. An example from our case studies is the mass of job-seeking aliens and labor-seeking employers addressed by the labor certification rules. At some point, as I suggest in the INS case study, an audience may become so remote and unsophisticated as to be impervious to improved regulatory draftsmanship. But short of that point, verbally transparent rules often provide the most

efficient method of communicating administrative policy to large groups. An agency (like the FCC, OCC, or even SEC) that deals with a smaller, more stable, and more sophisticated audience, on the other hand, can rely on alternative methods of communication such as response to informal inquiries, public statements, and the "grapevine."

The incremental payoff, in enhanced rule compliance, from clarifying a rule also depends on the expected level of evasive behavior by the regulated population. Rule clarification discourages evasion by reducing the perceived probability of its success. The expected level of evasive behavior is a function of two variables: The cost of compliance and the difficulty of concealment. Where compliance with a regulatory policy requires the rule's addressees to incur substantial incremental costs or to forego substantial benefits, the predicted rate of evasion is high. One might therefore expect aliens to make a greater effort to evade entry restrictions than change-of-status restrictions. Airline pilots, likewise, would have a more powerful inducement to conceal disqualifying infirmities than would healthy applicants for disability insurance to fabricate infirmities. Those who own large blocks of unregistered stock in especially shaky companies would have the greatest incentive to evade registration requirements.

The likelihood and magnitude of evasive activity also depends on the ease or difficulty of concealing prohibited conduct. Where concealment is relatively easy, as in the case of hiring illegal aliens, bright-line rules are needed to facilitate detection by investigative personnel and reporting by victims or observers. This justification applies with less force to conduct, like piloting commercial aircraft or public sale of securities, that is highly visible or easily traced. Private enforcement, through the tort system (e.g. hazardous material transportation standards) or industrial self-policing (e.g. the age-60 rule), may reduce the incremental deterrent value of rule clarification (unless, of course, the behavior of potential private enforcers itself depends significantly on the precision of the governing standard).

2. Rule Application and Enforcement Costs

Increasing a rule's verbal clarity should reduce the costs (to both the regulated population and the government) of applying it to specific transactions. The magnitude of this saving, and the consequent relative value of rule precision in different contexts, will depend primarily on the magnitude of the underlying rule-application transaction costs.

For present purposes, it is useful to distinguish between two kinds of rule-application transaction costs: "planning" costs and "enforcement" costs. Planning costs include resources expended on rule interpretation by private persons interested in determining the legal consequences of contemplated behavior or the legal status of a

current or anticipated condition. Enforcement costs include the resources expended by both private interests and the government in the course of authoritatively applying a rule to a particular situation.

The relative magnitude of planning and enforcement costs depends in large part on the type of rule. Conduct-regulating rules typically generate larger planning costs than enforcement costs, whereas status-recognition rules involve little or no planning costs. Thus, the planning costs incurred by potential resellers of unregistered securities (and probably their brokers as well) undoubtedly dwarfed the cost of administering the SEC's clearance system. The only "planning" cost incurred by disability applicants, by contrast, is in deciding whether to apply for benefits.

The magnitude of planning costs presumably depends on both the volume and the value of the potential transactions to which the rule plausibly applies. Each potential transaction presents an occasion for an exercise in rule interpretation that could be simplified by clearer draftsmanship. So, for example, the labor certification rules come into play each time an employer contemplates hiring an alien. Yet, because the incremental value of an individual transaction is limited, employers probably will not often invest heavily in rule interpretation. Potential resellers of unregistered securities, on the other hand, often face a much higher exposure to loss from an incorrect interpretation. As a group, then, they can be counted upon to invest heavily in legal advice.

Enforcement costs are more easily estimated. The number of enforcement actions and the agency's share of enforcement costs are directly observable. Where the agency lacks relevant enforcement experience, it can make predictions based on plausible assumptions. Once again, the volume and value of regulated transactions will strongly influence the result. The larger the number of persons or events governed by the rule, the larger will be the number of times that the agency is called upon to make an authoritative determination. This is especially true of rules that govern the dispensation of benefits or privileges, since private applicants control the volume of cases. Agencies exercise far more control over the volume of formal proceedings for enforcing regulatory commands. But, even here, there is probably a rough correlation between enforcement activity and regulated activity.

The resources expended by participants in enforcement proceedings will depend generally on the value, to each party, of the desired outcome. Thus, an applicant for a labor certification will typically expend far less than an applicant for a bank charter or broadcast license. By the same token, the administering agency will expend more on bank chartering or broadcast licensing cases than on alien labor certifications.

The formality of the procedure afforded to a private applicant or respondent for contesting an adverse decision also influences the magnitude of enforcement costs. The more elaborate and formal the procedure, the larger an investment of resources one would expect. The disability insurance procedures are, for this reason, far more expensive than the parole release procedures. But the availability of formal procedures is no guarantee of their use. Bank charter applicants have fewer procedural rights than HMTA violators, yet unquestionably expend more of their own (and the government's) resources on the average proceeding. Only when the value of a favorable decision is held constant, do differences in procedural formality make a significant difference. For this reason, an applicant for a broadcast license will probably expend more than an applicant for an equally valuable bank charter.

3. Rulemaking Costs

An impediment to precision enhancement is the cost of initial rulemaking. Sometimes, as in the parole guidelines and disability case studies, development of more transparent rules involves a very substantial initial investment. As indicated earlier, this cost has two components -- the cost of conducting research and analysis so as to anticipate the rule's impact and the cost of securing agreement among participants in the rulemaking process.

It is interesting that agencies rarely invoke rulemaking costs explicitly as a justification for resisting precision-enhancing rule amendment. They tend, instead, to speak in the language of possibility: "it is impossible to foresee and enumerate all of the favorable and adverse factors which may be relevant and should be considered" (435) Taken literally, such an assertion is undeniably correct. But for agencies like the INS, FCC, and DOT, whose rules fall far short of the limits of foresight, such a statement must be interpreted as a statement about the costs and benefits of analysis. In effect, "it is too expensive to attempt to foresee and enumerate in any greater detail the factors which may be relevant and should be considered."

The weight to be attributed to the "rulemaking cost" element of such an argument depends on the extent to which initial rule clarification reduces the demand for subsequent policy specification. As discussed earlier, the administration of a program creates pressures -- usually, but not always, irresistible -- for elaboration of "policy" into intelligible principles. To the extent that an investment in initial rulemaking can mitigate these

435. See 46 Fed. Reg. 9119 (1981) (INS explanation for rejecting proposed standards to govern the exercise of discretion).

pressures and displace later rulemaking, the "rulemaking costs" argument loses force as a defense for opacity.

Comparing the cost of initial rulemaking with the present value of future rulemaking activities thereby avoided is never easy. The case studies suggest two variables on which the outcome of such a comparison will depend: 1) The procedural formalities actually employed in administering the program, and 2) the degree of centralization of the decisionmaking process. At the one extreme is a program like parole release, vintage 1970, centrally administered through an extravagantly informal process consisting of no more than a perfunctory interview. Neither the statute nor the Constitution required a more formal procedure, and the applicants typically lacked sufficient knowledge or influence to demand more than the minimum offered. Reviewing courts, when their services were enlisted at all, accorded extreme deference to the agency. The result was a system that produced almost no external pressure for policy articulation. The constant interactions among decisionmakers gave them a kind of unspoken "feel" for governing policy, moreover, that held in check internal pressures for articulation.

At the other extreme is the disability program. Not only does the statute provide for an elaborate, and increasingly formal, sequential process of decisionmaking, but claimants actually utilize those procedures in a large number of cases. The agency faces insistent demands from genuinely disappointed claimants for intelligible explanations. Motivated by sympathy for the plight of most disability claimants, courts conduct a particularly probing and skeptical review of administrative denials.

In addition to its procedural formality at the top, the Disability Insurance program is administered at the bottom by an extremely decentralized apparatus. The myriad state vocational rehabilitation agencies and their consulting physicians and vocational experts would probably demand guidance from the agency in any event. And even if they did not, the problems of maintaining quality control in so farflung an empire would force the agency to invest in the formulation of guidelines and standards. Failure to do so would entail politically intolerable costs in uncorrected errors. While false negatives (erroneous denials) inflict at least as great a cost on society as false positives (erroneous grants), the latter seem more likely in a system administered (initially) by the states, but funded wholly by the federal government. The resulting pressure on the federal treasury would force the SSA to impose tight quality control to counterbalance the financial incentives for leniency.

For cases falling in between these two extremes, estimating the net rulemaking cost is more difficult. Where, as in the bank chartering case, the degrees of procedural formality and

decentralization are both low, the net rulemaking cost of precision enhancement is likely to be positive. Where, as in labor certification or alien status adjustment, both are high, net rulemaking cost is likely to be negative. Intermediate cases such as broadcast licensing (high procedural formality, low decentralization), present the hardest case. Since rulemaking costs rarely loom very large relative to the other three factors, an assumption of zero net rulemaking costs will usually be justified unless one factor seems clearly to predominate.

4. Congruity Losses

Since the most powerful argument against adopting specific rules is their unavoidable incongruity, a strategy for achieving the optimal degree of rule precision must concentrate on minimizing such costs. To begin with, it is impossible even to incorporate this factor into the analysis without some reasonable degree of agreement on underlying policy objectives.

"Incongruity" measures deviations of rule-dictated results from desired outcomes. As the broadcast regulation case study illustrates, identifying the class of "desired outcomes" is very difficult without relying exclusively on either the outcomes actually produced by the agency or the terms of the verbal formulation in which it happens to have couched its rule. Either way, the analysis is tautological -- the status quo produces an exact fit between actual and "desired" outcomes, or between rule-dictated and "desired" outcomes.

The only escape from this trap is to invoke some prior principle -- drawn from higher law or one's personal sense of good policy -- against which to judge administrative outcomes. Statutory language and legislative history help, to be sure, but the impetus for administrative clarification reflects the typical incompleteness and ambiguity of most statutory delegations. The outside observer is singularly disabled in this enterprise, possessing no authority, other than the force exerted by his private morality, to dictate gap-filling objectives. But the administering agency, on the other hand, has not only the legitimate authority but, most would say, the duty to fill in the gap left open by ambiguous legislative direction. Consequently, difficult as it may be for the outside observer to "measure" incongruity, he can still with a straight face and clear conscience urge agencies to do so and to clarify their rules in areas where the resulting incongruity losses are likely to be small.

In the search for such areas, it is essential to remember that incongruent outcomes can result from opaque rules as well as precise ones. Such outcomes may have different causes, to be sure. Opaque rules characteristically produce "errors of misapplication," whereas precise rules produce more "errors of

misspecification." But there is no a priori reason to believe that, as between competing rule formulations, the more precise will necessarily yield more costly errors.

So, in searching for candidates for precision enhancement, the agency should first look for programs involving a high inherent risk of application errors. Programs administered on a highly decentralized basis tend to have this characteristic. The physical, organizational and professional isolation of decisionmakers in a program like disability insurance virtually assures that, in the absence of relatively concrete guidelines, individual decisions will deviate from the outcome desired by the agency in a high percentage of cases. While centralized review of decisions can reduce the rate of application errors, that corrective is itself costly.

The age-60 and parole guidelines cases illustrate a second context in which the net error-cost of bright-line rules may be especially small because of a high inherent risk of application-error. Sometimes an agency knows quite specifically what outcomes it wishes to prevent (e.g. airline accidents (FAA) or recidivist acts (Parole Board)), but it understands only imperfectly the processes that produce those outcomes. That is, the agency is unable (within reasonable limits of investigation) to find any method of discriminating between "good" and "bad" risks with a very high probability of success. Thus, for example, even if the "salient factor" scale mispredicts recidivism 40 percent of the time, the alternative "gut feel" method may have done little better. If the agency is convinced -- as the FAA has consistently claimed to be -- that no more individualized or open-ended method can significantly reduce the rate of application error, then the incongruity argument against using an admittedly clumsy bright-line test loses much of its force.

The FAA and Parole Board are to be commended for their willingness to invest in research on the consequences of their policies. Without such research, it is virtually impossible to determine the risk of error inherent in an existing opaque formulation and, therefore, the price likely to be paid by adopting a more precise formulation.

The other variable in measuring net incongruity losses is the cost of the "specification errors" likely to be produced by a bright-line rule. Agencies should favor precise formulations whenever this quantity is small. Identifying contexts a priori in which that will be the case is no mean feat. In principle, misspecification is most likely when the conduct regulated is especially heterogeneous. But this idea is extremely difficult to operationalize, since "heterogeneity" is not a self-defining or intrinsic concept, but takes meaning only from the regulatory context. If, for example, we decide that pilots' proclivity to

suffer incapacitation is a function of their biological inheritance, or what they eat, drink, and breathe, then we might find the regulated population "heterogeneous." But if we decide that it is a function of stresses in their occupational environment, we would find the population "homogeneous."

The "scope" of a rule is one possible proxy for "heterogeneity." We would expect to encounter greater difficulty, for example, in defining "disability to perform any occupation" than in defining "disability to be a commercial pilot." But the difference may be merely one of effort, not degree of difficulty. A "larger" rule may take more effort to write, but the payoff from the effort will also be proportionally larger.

Another possible proxy for heterogeneity is rate of change over time. The more rapid the rate of change in either the regulated behavior or in human knowledge about that behavior, the greater is the risk that bright-line rules will freeze policy into undesirable patterns. For example, the Comptroller of the Currency has argued that bank chartering policy must be free to adjust to changes in the economic climate. Of course, a critic of the age-60 rule might argue that the supply of and demand for pilots can change just as rapidly as the economics of banking. But the FAA could reasonably respond that, whereas economic factors are central to the purposes of bank regulation, they are at best secondary to safety considerations in pilot licensing (and perhaps totally irrelevant). Still, the "rate of change" variable suffers from the same inherent subjectivity and policy-dependence as "homogeneity." Only in relatively extreme cases -- such as regulation of new technology -- is it likely to provide a very reliable guide to the policymaker.

In measuring incongruity losses, one must look at the consequences as well as the rate of "misspecification errors." A single error by the FDA in incorrectly licensing a harmful new drug (or, for that matter, excluding a life-saving new drug) should trouble us a great deal more than a thousand citations for harmless parking violations.

While none of the case studies in this report involves decisions having potential consequences as nightmarish as a Thalidomide disaster, the OCC and FCC studies do involve individual decisions with rather broad potential impacts. They illustrate the "lumpiness" of business licensing decisions generally: They make an all-or-nothing judgment about conduct potentially affecting a large number of market transactions. Although continuing supervision can reduce the risk of untoward consequences, their detection may come too late to prevent significant social harm. The pilot licensing (and de-licensing) decision has a similar quality.

At the other extreme, in our sample, are decisions like the HMTA penalty computation. In addition to involving relatively small sums of money, this decision involves a continuous range of possible outcomes. The penalty determination (as opposed to the liability determination) is not an all-or-nothing decision. The parole system operates in much the same fashion. Although the former Parole Board nominally made only "in-out" decisions in response to parole petitions, in practice the Board had a more continuous range of choices available, since denial usually took the form of a continuance to a presumptive future release date designated by the Board. In 1977, the Commission made this system more explicit and universal, by adopting the current practice of setting a presumptive future release date (contingent on good behavior) within 120 days from admission. In a system of continuous possible outcomes, the consequence of errors is not likely to be as great as in a system of binary choice.

Whatever the a priori magnitude and likelihood of misspecification errors -- difficult to estimate in most cases -- the case studies illustrate some useful techniques for confining these risks. The disability insurance rules, for example, use a sequential decision rule that tends to eliminate most of the "easy" cases (clearly disabled, clearly not disabled) whose erroneous resolution would involve the largest social cost, and confine most of the potential for misspecification error to the cases near the borderline. Even though a bright-line rule (like the grid) undoubtedly makes many misspecification errors in the remaining cases, the social costs of those errors, taken individually, is small. The Labor Department and Parole Board have used similar devices in structuring their rules.

VI. CONCLUSION

This study was premised upon the belief that empirical analysis of administrative rule precision is both feasible and fruitful. I believe that the results vindicate that belief. The case studies illuminate factors that explain variations among different rules, as well as changes over time in particular rules. Those factors provide a framework, in turn, against which the products of administrative draftsmanship can be evaluated from a normative perspective.

To say that rule precision is amenable to empirical study does not in any way belittle the difficulties inherent in the task. Measuring degree of rule precision and tracing its behavioral consequences present formidable conceptual and practical problems. Yet reasonable approximations can usually be made without insuperable effort. Even if one cannot calibrate the absolute precision of an individual rule, one can at least arrange alternative formulations in a rank order, or identify the general

tendency of a proposed amendment. Similarly, even if one cannot quantify the costs and benefits of moving from one formulation to another, one can at least categorize the probable impacts and make qualitative estimates of their weight.

In assessing the various costs and benefits of clarifying administrative rules, several contextual variables emerged as particularly useful indicators. These include: the volume of transactions governed by the rule; the value of the interests typically at stake in those transactions; the sophistication and resourcefulness of the rule's audience; the formality of procedures provided for authoritative application of the rule; and the degree of decentralization in the enforcement process. The virtue of these indicators is that they can be fairly readily observed and qualitatively "measured," while at the same time serving as a reliable proxy for several categories of costs or benefits in our "precision calculus." Thus, for example, the volume of transactions governed by a rule is a good predictor of the payoff from rule clarification because it correlates well with: 1) the social cost of noncompliance, 2) the number of misapplication errors, 3) the level of future demand for case-by-case policy elaboration, and 4) the level of social investment in rule application. Similarly, the greater the degree of administrative decentralization, the greater is the potential for achieving savings by reducing the volume of quality control activities and misapplication errors. Clarifying rules that govern transactions affecting very large individual or social stakes, moreover, can significantly reduce evasion costs, litigation costs, and future ("ex post") rulemaking costs.

While these parameters can thus serve as useful signposts in the search for optimal precision, they do not, and cannot, substitute for morally sensitive judgment. An empirical analysis that focuses on measurable "costs" and "benefits" admittedly depreciates "soft" values that cannot readily be quantified. Most of us would maintain, I suppose, that basic values like fairness, dignity, or equity demand some threshold degree of verbal precision from any legal regime, irrespective of its measurable impact on error rates or transaction costs.

There may well be occasions when the results produced by a more explicitly deontological approach would diverge from those generated by a utilitarian one. Perhaps the parole case study stands as a reminder of that fact. But I suspect that those occasions will be rare. Mercenary as my approach may seem to some, variables like compliance rate and litigation cost usually do a pretty good job of mirroring intensity of participants' feelings (if not observers' feelings) about relative fairness or equity. Moreover, the empiricism utilized here--and likely to be utilized by any practitioner of the method--is sufficiently casual to accommodate a healthy dose of nonquantifiable values.