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Discretionary Decisionmaking in the Regulatory Agencies: A Conceptual Framework

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DISCRETIONARY DECISIONMAKING IN THE REGULATORY AGENCIES: A CONCEPTUAL FRAMEWORK†

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For years, Professor Kenneth Culp Davis has directed the professional public's attention to the prevalence of what he believes to be insufficiently confined administrative discretion.[1] Davis has found powers of unduly wide latitude in agencies and administrators, such as tax collectors,[2] police officers,[3] welfare administrators,[4] and independent agencies supervising business behavior.[5] In general, Davis recommends confining the discretionary powers of agencies and officials more narrowly than they have been done in the past. He suggests that where discretion cannot practically be so confined, it should be "checked" or "structured."[6] Thus, Davis urges that "one officer should check another, as a protection against arbitrariness."[7] By structuring, he means that agencies should justify their decisions by relating them publicly to other decisions, rules, standards, principles, or policy statements.[8]

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1. *E.g.*, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8:1, at 157 (2d ed. 1979) [hereinafter cited as 2 ADMINISTRATIVE LAW TREATISE]; K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 15 (1969) [hereinafter cited as DISCRETIONARY JUSTICE].

2. *See* DISCRETIONARY JUSTICE, *supra* note 1, at 42-43 (perfecting tax regulations by expanding rules will always be necessary).

3. *Id.* at 87-88.

4. *Id.* at 180.

5. *See id.* at 70 (Federal Trade Commission should make rules to give meaning to vague terms).

6. *See id.* at 54-55 (principal ways to control necessary discretion are checking and structuring).

7. *Id.* at 142. "Checking includes both administrative and judicial supervision and review." *Id.* at 55.

8. *Id.* at 97-141.

This Article is a preliminary exploration of decisionmaking by regulatory agencies. The purpose of this exploration is to identify those types of discretionary decisions that can properly be subjected to constraints and those that are less susceptible to such constraints.

I. CIRCUMSTANCES IN WHICH DISCRETION CAN OR CANNOT BE CONFINED OR STRUCTURED

One must examine the problems associated with administrative discretion in an analytical framework that provides a basis for exploring the relationship between discretion, and its exercise, and the devices for structuring or confining discretion,[9] such as standards and rules. Thus, as Davis acknowledges, one can visualize official behavior taking place on a spectrum,[10] on one end of which precisely drawn rules confine or eliminate the choices of officials, and on the other end of which the absence of rules or decisional guides provide maximum discretion to officials. This spectrum, joined with the inherent flexibility of language, means that rules can be tailored to embody the exact amount of precision or vagueness desired. Hence, those rules can confer as much or as little discretion upon a regulator acting in any given context as is desired.[11] Rules can also, of course, structure and guide choice by embodying standards or by setting forth factors that a decisionmaking official is instructed to take into account in reaching his decisions.[12]

Davis has beneficially heightened the professional public's awareness of the extent of uncontrolled discretion permeating the governmental administrations and bureaucracies and has provided a refined collection of tools for controlling discretion.[13] Yet a major problem remains unresolved: the development of criteria for optimizing the extent of official conduct that is, in various ways, confined or structured, and the related question of the extent to which official conduct should properly be discretionary.[14]

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9. *See* 2 ADMINISTRATIVE LAW TREATISE, *supra* note 1, § 8:4, at 167-69 (discussing devices to structure and confine discretion).

10. *See id.*, § 8:4, at 168 (describing the movement from no standards to governing rules); DISCRETIONARY JUSTICE, *supra* note 1, at 15 (goal is to find the "optimum point on the rule-to-discretion scale").

11. *See* 2 ADMINISTRATIVE LAW TREATISE, *supra* note 1, § 8:7, at 183-92 (ideal system contains precisely the right mix of rule and discretion).

12. *See id.*, § 8:4, at 169, § 8:7, at 189-90 (the best rules require that precedents be followed or that departures be acknowledged or explained).

13. *See id.*, § 8:7, at 183-92 (presenting 20 basic propositions about rule and discretion).

14. *See, e.g., id.*, § 8:7, at 191 ("No published study has examined administration of an

This Article attempts to supply some of the needed criteria. The major premises of this Article are: (1) the proper guiding, structuring, or confining of discretionary decisionmaking must ultimately be related to the agency's information collection and evaluation processes because authoritative rules or guides ought to be imposed upon decisionmakers only when these rules or guides produce decisions of higher quality than would be the case without them; (2) better informed people tend to make higher quality decisions; (3) the decisionmaking process itself is often a major source of agency information; (4) the value of agency experience in deciding cases and as sources of relevant information for the formulation of standards governing the disposition of future cases is affected by the nature of the agency caseload.

A. The Recurrence of Relevant Facts

One can derive an approach to determine the criteria for optimizing the use of rules, standards, and discretion within governmental administration from Davis' main recommendation for controlling administrative discretion. Davis acknowledges in his revision of the nondelegation doctrine[15] that legislative bodies will often find it impractical to formulate precise standards to be employed by administrative officials.[16] Davis urges that in the absence of legislated standards administrative bodies should create, over time, their own standards as a result of their accumulated experiences.[17]

Much of Davis' language suggests that the administration experience itself aids agencies in narrowing the extent of their discretionary power.[18] Indeed, Davis envisions a process through which initially wide discretion is narrowed—first by standards, then by principles, and finally by rules.[19] Thus, Davis urges that "[w]hen legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion

agency's particular policies for the purpose of planning an optimum mix of rule and discretion for those policies." (emphasis omitted)).

15. *See* 1 K. Davis, Administrative Law Treatise § 3:15, at 208 (2d ed. 1978) (purpose of nondelegation doctrine "should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards," but rather should be "to protect private parties against injustice on account of unnecessary and uncontrolled discretionary power" (emphasis omitted)).

16. *See id.*, § 3:15, at 211 (legislators are "often unable or unwilling to supply" standards).

17. *Id.*, § 3:15, at 211-12.

18. *See, e.g.*, 2 Administrative Law Treatise, *supra* note 1, § 8:5, at 175-76 (commending a proposal that agencies review their rules in light of their experience).

19. *See id.*, § 8:4, at 168 (describing movement from guiding standards to governing rules).

through principles and rules."[20]

Other commentators also advocate such a process, among them, Judge Friendly:

> [W]here the initial standard [provided by Congress] is thus general, it is imperative that steps be taken over the years to define and clarify it—to canalize the broad stream into a number of narrower ones. I do not suggest this process can be so carried out that all cases can be determined by computers; I do suggest it ought to be carried to the point of affording a fair degree of predictability of decision in the great majority of cases and of intelligibility in all.[21]

The assumptions inherent in Davis' and Friendly's positions are: (1) the administration of a statute is a learning process for an agency; (2) repeated application of the statute to differing situations forces that agency to evaluate specifically the various problems faced by regulated subjects; (3) this repeated contact with the regulation in a variety of circumstances helps the agency develop an overview of the problems; (4) the needed narrowing of discretion comes from rules, standards, and precedents that gradually emerge as the agency acquires more information about its tasks; and (5) this information comes, in part, from the repeated decisionmaking.

A quite different approach towards the development of decisional criteria is taken by those apologists for agency behavior who emphasize the "factual" component of agency decisionmaking and deemphasize the extent to which decisionmaking depends upon rules or precedents. Usually, they describe agency work as resolving numerous cases in which the particular factual components rarely repeat themselves. Under this approach, precedents or rules play a smaller role in administrative decisions than in judicial decisions. This is due to the factual variety of the cases coming before an agency for decision. Professor Sharfman, the historian of the Interstate Commerce Commission, has spoken in this way:

> Perhaps the most comprehensive evidence of the pragmatic character of the Commission's regulative processes is to be found in the relatively minor r[o]le played by precedent in the flow of administrative determinations. The special facts of each controversy constitute the dominant factor in its disposition, as a result of which very few new complaints are foreclosed by prior determinations and even proceedings which have already been adjudicated are reopened with striking frequency. The adjustments enforced by the Commission

20. 1 K. DAVIS, *supra* note 15, § 4:15, at 213 (Supp. 1970).

21. H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 14 (1962).

> come to manifest themselves in a continual process of change and modification, induced by the dynamic forces constantly at work and reflected in the adoption of trial-and-error methods tested by their practical consequences. Not only do concrete findings change repeatedly, but the applicable rules, in terms of the guiding statutory standards, are also modified from time to time as occasion seems to require. The doctrines of *res adjudicata* [sic] and *stare decisis*, which exert an important influence upon the course of proceedings in the courts and upon the substantive character of judicial determinations, are not permitted to impose limitations upon the exercise of administrative discretion. Neither specific determinations nor principles of decision are clothed with any controlling degree of finality. While the advantage of establishing certainty in rules of conduct is not without recognition, and while the goal of maintaining stability and consistency in regulatory policy is constantly in the foreground, these considerations have not precluded primary stress upon the need of flexibility of performance. Such need arises from the very nature of the administrative method. Even quasi-judicial determinations are made in the enforcement of standards which have not crystallized into specific rules of law, and hence must depend, in predominant measure, upon the special facts and circumstances disclosed in each particular proceeding; and the affirmative adjustments prescribed, which are essentially legislative in character, must necessarily be unrestricted by prior determinations. Under these circumstances the certainty and stability that might flow from rigid rules and unvarying principles are appropriately subordinated to the demands of just and reasonable performance, as molded by enlightened experience and informed judgment.[22]

Sharfman's approach to administrative discretion does not reject the values of decisional consistency inhering in Davis' and Friendly's positions.[23] Rather, Sharfman's deprecation of rules, precedents, standards, consistency, and predictability results from his different perception of the kinds of cases which form the bulk of the agency workload. The nonrepetitious nature of these cases accounts for his emphasis upon the importance of "the special facts of each controversy" and his belief in the unimportance of precedent in that agency's work.[24]

The different assumptions about the composition of administrative

22. 2 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 367-68 (1931).

23. *See supra* text accompanying notes 20-21.

24. *See supra* text accompanying note 22. *See generally* Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation,* 56 CORNELL L. REV. 409, 460-61 (1971) (referring to each case as a unique event indicates that the role of the agency is managerial rather than educational).

workloads need greater explanation. Sharfman focuses upon agency regulation in which factual patterns relevant to official disposition recur infrequently.[25] An agency in this situation finds it impractical to develop rules in advance for handling cases. Even actual case dispositions lack much significance as precedents because of the differences in the factual composition of the cases.

Cases consisting of nonrecurring factual patterns destroy the efficiencies normally associated with rulemaking.[26] Ordinarily, rulemaking enables an agency to formulate criteria to resolve a whole class of cases. Thus an investment in rulemaking tends to lessen the decisional burden which the agency would otherwise incur in deciding each of the cases to which the rule applies. Moreover, an agency may improve the quality of its decisions by concentrating its decisional resources in one rulemaking procedure. This rulemaking approach, accordingly, may enable the agency to explore the underlying regulatory problem more deeply and thus to develop a set of solutions that are more effective than those that the agency could derive from a series of cases involving only one or a few parties. Finally, rules once promulgated, provide the regulated public the opportunity of complying with them, thereby obviating the necessity of further agency action.

Davis and Friendly implicitly assume that the relevant factual patterns, as perceived by the supervising regulatory agency, recur frequently.[27] Sharfman, in contrast, assumes the opposite.

The Sharfman conception and the Davis/Friendly conception of the composition of an agency's caseload represent opposite ends of a continuum. In the center of this continuum are core factual patterns which tend to recur in association with sets of nonrecurring, more-or-less relevant facts. Some of these nonrecurring facts rise to such a degree of relevance as to be outcome determinative, while others do not. For the type of caseload represented by the middle of this continuum, an agency may establish standards, principles, or lists of factors to guide its decisions, but it cannot constrain its decisionmaking with precisely drawn rules.

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25. *See supra* text accompanying note 22. Because each controversy is comprised of special facts, precedent cannot play a major role because the same rule cannot be used on different facts.

26. *See, e.g.,* Gifford, *Report on Administrative Law to the Tennessee Law Revision Commission,* 20 VAND. L. REV. 777, 783-85 (1967) (discussing the efficiencies and practicalities of rulemaking).

27. *See supra* text accompanying notes 20-21.

B. THE IMPORTANCE OF THE DECISION

An agency decision may be "important" to the achievement of overall regulatory goals in three ways.[28] First, an agency decision may be important solely because of the impact that particular decision has on the agency's regulatory goals, apart from any significance the case may have as precedent. For example, prior to the advent of international competition in the American automobile market, one could have made a plausible case that General Motors Corporation possessed an undue amount of market power. Had the Federal Trade Commission formally considered the dissolution of that firm into several manufacturing components,[29] the agency decision would have been important in itself. It would not have mattered that the peculiar features of the GM case which led the agency to consider the question of dissolution were so unique that the case would have had virtually no effect as precedent for the decision of other cases.

Second, an agency decision in a particular case may be important for its development of one or more standards[30] or guides to be used in the resolution of subsequent cases. The importance of a decision that develops a standard depends upon the regularity with which the relevant factual patterns recur in future cases. Even if a standard does not

28. *See* Posner, *The Behavior of Administrative Agencies,* 1 J. LEGAL STUD. 305, 310-11 (1972) (importance of a case as a precedent is derived from the public benefit gained from the proceeding). Posner states that the goal of an administrative agency is to maximize the utility of its law enforcement activity. *Id.* at 305. He defines utility as the public benefit resulting from such enforcement. *Id.* Thus, cases may be described as "important" or "unimportant" to the degree that they produce social benefits. *See also* Gifford, *supra* note 24, at 451 (cost-benefit approach would lead an agency to devote more time to policy clarification affecting a large number of transactions).

29. If a dissolution proceeding were to be brought, it might be based on § 7 of the Clayton Act and would be directed at the series of corporate acquisitions that created the present firm. *See* 15 U.S.C. § 18 (Supp. V 1981) (prohibiting the acquisition of stock or other share of capital when the effect of the acquisition tends to create a monopoly). *See also* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 588-89 (1957) (charging that du Pont used its stock interest in General Motors to become a monopoly supplier of GM's finishes and fabrics in violation of § 7 of Clayton Act).

30. As used in this Article, the term "standards" is similar to, but not identical with, Professor Ronald Dworkin's "principles." Dworkin's principles point the way and must therefore be taken into account; they possess a dimension of weight or importance, yet are not determinative in an all-or-nothing fashion. *See* Dworkin, *The Model of Rules,* 35 U. CHI. L. REV. 14, 25-28 (1967) (discussing the difference between legal rules and principles). Because standards may be promulgated with infinitely variable degrees of precision, one may visualize them as being on a continuum. As the standards become more precisely formulated, they become increasingly dispositive of the cases to which they apply. *See* Gifford, *supra* note 24, at 443 ("relationship between (relatively) precise and imprecise standards determines the division between conduct that is basically self-regulated . . . and conduct that is allocated to individual decisions").

dispose of all the issues that may arise in these cases, a standard's importance will be a function of the number of times the issue arises and the degree to which the resolution of the issue aids in disposing of those cases.[31] For example, had the National Labor Relations Board (NLRB), in the years before the Taft-Hartley Act, adopted general standards to evaluate the application of the National Labor Relations Act to independent contractors or supervisors,[32] the NLRB's formulation of those standards would not necessarily have been dispositive of any future case, but their formulation would certainly have assisted in disposing of many cases.[33]

Third, a single agency decision may be important because it serves as a precedent or rule that disposes of an entire class of cases.[34] For example, one workman's compensation board decided that hernia claims are not compensable in the absence of corroboration by immediate and sustained disablement at the time the employee first claimed symptoms.[35] Another example would be an Environmental Protection Agency rule establishing the maximum permissible lead content of gasoline, effectively imposing rigid standards upon a whole class of indus-

31. If the standard is primarily useful in avoiding results that the agency might sometimes reach in an ad hoc determination of a series of cases, then the importance of the standard is reduced when the aggregate of avoided results does not significantly detract from the achievement of the agency's overall regulatory goals. *See supra* text accompanying notes 28-29.

32. The NLRB did decide that the National Labor Relations Act was applicable to independent contractors and supervisors and the Supreme Court upheld the NLRB decisions. *See, e.g.,* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 490 (1947) (Labor Act entitles foremen to act as a bargaining unit); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 135 (1944) (NLRB decision that newsboys are entitled to collective bargaining did not lack a rational basis). Congress later repudiated both NLRB decisions. *See* 29 U.S.C. § 152(3) (1976) (the term "employee" does not include an independent contractor or a supervisor).

33. *See* Gifford, *Declaratory Judgments Under the Model State Administrative Procedure Acts,* 13 HOUS. L. REV. 825, 860 (1976) (application of National Labor Relations Act to complex, non-recurring facts involved in *Hearst Publications, Inc.* weakened precedential value of the decision).

34. The precedential effect of an adjudicatory decision affects the participation interests of the parties involved. *See* Simpson v. Union Oil Co., 411 F.2d 897, 903-04 & n.4 (9th Cir.) (citing cases in which institutional litigants would stand to benefit in the future from a new rule even though they did not receive the benefit of that rule in the present case), *rev'd,* 396 U.S. 13 (1969); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change,* 9 LAW & SOC'Y REV. 95, 100 (1974) ("one-shot players" have little interest in the aspect of a decision that might influence a future decision, whereas "repeat players" consider a decision that will influence future cases to be a worthwhile result); Posner, *supra* note 28, at 311 ("usual defendant is uninterested in whether the outcome of his case will have precedential significance").

35. *See* McCarthy v. Industrial Comm'n, 194 Wis. 198, 205, 215 N.W. 824, 826 (1927) (affirming order of Industrial Commission denying compensation for one who did not present sufficient explanation of the cause of his hernia).

trial firms.[36] In these cases, the aggregate external impact of an agency decision is measured by the total behavioral change which the rule brings about. To the extent that a rule or precedent facilitates socially useful behavior and thereby eliminates the need for many particularized enforcement proceedings, the issuing agency also beneficially conserves its enforcement resources for other uses. Indeed, any agency decision which contributes to the consistency of the agency's regulatory approach and to improving the coherence of the regulatory scheme administered by it helps further regulatory goals by facilitating overall compliance with those goals by the regulated public. In summary, the aggregate impact of an agency decision that formulates a standard to address recurring issues consists largely in: (1) the effect of the standard in discouraging behavior which would have been performed in the standard's absence; (2) the saving in enforcement costs which the standard provides; and (3) the consistency in the agency's own disposition of litigated cases which the standard engenders.

An overview of the different kinds of regulatory situations that agencies face is illustrated in Figure 1. The horizontal scale reflects the extent to which patterns of relevant facts or factors recur, and the vertical scale reflects the degree to which an agency's disposition of each case contributes to overall regulatory goals; that is, the degree of regulatory "importance" of each case.

The upper half of Figure 1 represents those cases that are important to the achievement of the agency's regulatory responsibilities. An example of such a case might be a utility rate proceeding. Normally a public service commission oversees only a few rate proceedings, but each proceeding determines the utility rates that thousands of consumers must pay. The commission's decision in each such case, therefore, constitutes a significant part of the commission's overall responsibilities. These considerations indicate that the proceeding falls in the northern half of Figure 1. To the extent that the facts in a particular rate case are unique to the time, place, and identity of the particular utility before the commission, and are perceived as unique by the governing public service commission, such a rate proceeding belongs specifically in the NW section of Figure 1.

36. *See, e.g.,* Ethyl Corp. v. EPA, 541 F.2d 1, 10 (D.C. Cir.) (final standards promulgated by the EPA regarding lead in gasoline based on grams of lead per gallon of all gasoline produced rather than standards for permissible lead use by each individual refiner), *cert. denied,* 426 U.S. 941 (1976).

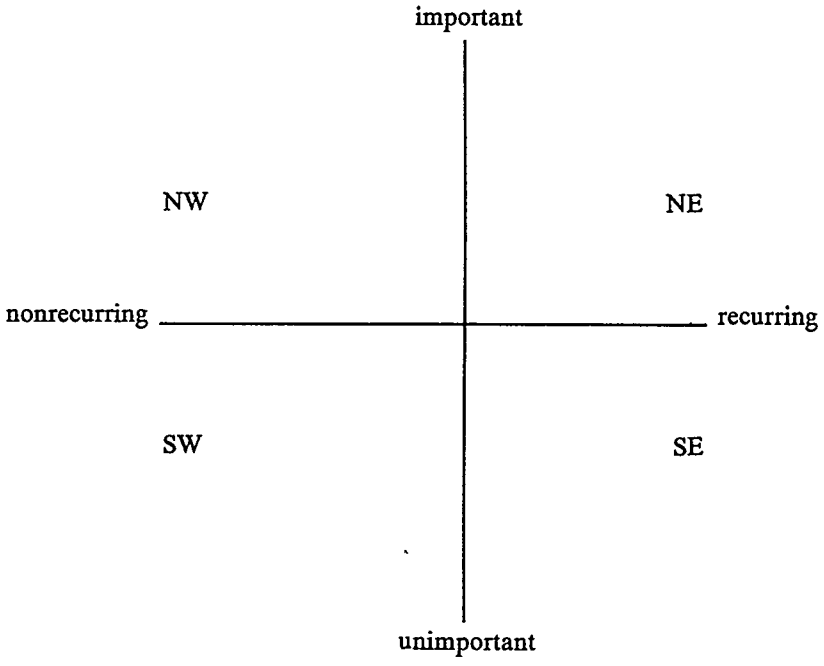

Figure 1

In the border area between the NE and NW sections of Figure 1 are those cases in which the agency decision is of significant importance to the achievement of the agency's regulatory goals but whose governing factual patterns are neither fully recurring nor nonrecurring. Although these cases possess recurring factual patterns, they also contain other elements that occur sporadically, partially offsetting the significance of their recurring factual elements towards particular dispositions.

Agency decisions of cases represented in this border area tend to create or apply standards rather than rules. Agency decisions in this region are more free from precedent-setting constraints than in the central or eastern areas of the NE section, but more are constrained than in most of the NW section. Consider a determination of whether a particular merger violates section 7 of the Clayton Act.[37] The Federal Trade Commission finds such determinations to be a relatively important part of its overall responsibilities.[38] Yet merger standards are now moder-

37. Clayton Act, 15 U.S.C. § 18 (1976 & Supp. V 1981).

38. The United States Supreme Court has held that the FTC has no power to determine

ately well developed, partially as a result of a series of decisions by the Commission and the courts that have contributed to the development of standards.[39]

In the NE section are those agency determinations, such as precedent-setting adjudications and rulemaking proceedings, that effectively determine the behavior of regulatory subjects in many instances in which the relevant factual configurations are essentially repetitious. An example of such a decision by an agency is the setting of pollution-toleration limits affecting an entire industry.[40]

The SE section contains that class of cases in which the relevant facts tend to recur and the individual disposition does not significantly affect the attainment of the agency's overall regulatory goals. Because factual configurations tend to recur in this class of cases, it is possible for an agency to develop standards and rules to govern their determination. Moreover, because resolving any particular case does not greatly help achieve agency goals, the agency (if it wishes) can delegate decisional responsibility to lower echelon personnel. This delegation can be accompanied by standards or rules which the lower echelon personnel are required to employ in reaching their decisions.

The SW section contains that class of cases in which the facts are nonrecurring and the individual disposition does not significantly affect the attainment of the agency's overall regulatory goals. As is the case

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whether a practice is an unfair method of competition. Federal Trade Comm'n v. Gratz, 253 U.S. 421, 427 (1919). Subsequently, however, the FTC's rulemaking powers were upheld. *See* National Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672, 678 (D.C. Cir. 1973) (substantive rules unquestionably implement § 6 of the Trade Commission Act, which provides for the FTC's investigations of violations of antitrust statutes).

39. For cases articulating merger guidelines, see, *e.g.,* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975); United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. General Dynamics Corp., 415 U.S. 486 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); Ford Motor Co. v. United States, 405 U.S. 562 (1972); United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970); United States v. Third Nat'l Bank, 390 U.S. 171 (1968); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. Aluminum Co. of Am., 377 U.S. 271 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962). *See also Merger Guidelines, Issued by Justice Department on June 14, 1982, and, Attorney General's Statement and FTC's Policy Statement on Horizontal Mergers,* 42 ANTITRUST & TRADE REG. REP. No. 1069 (Special Supp. June 17, 1982) (guidelines describing the general principle and specific standards normally used by Justice Department in analyzing mergers).

40. *See supra* note 36 and accompanying text.

with SE section cases, the agency can delegate decisional responsibility to lower echelon personnel. But because the agency cannot practicably develop standards for nonrecurring factual patterns, no meaningful standards accompany this delegation.[41]

C. Agency Workload: A Cost-Benefit Approach

The next step in developing a conceptual framework with which to view discretion is to assess the agency's workload in light of the methods that the agency employs to dispose of these cases. Sharfman essentially describes a "managerial" mode of decisionmaking by an agency.[42] Under this mode an agency sees the factual patterns in the cases before it as largely nonrecurring, and thus can only approach the decision of each case in an ad hoc manner. This approach requires an agency to balance the competing considerations in every case. It becomes more manager than regulator.

Figure 2 illustrates the degree to which the agency decides in a managerial way or, alternatively, decides on a rule-oriented regulatory basis by using criteria applicable to a class of cases, the criteria being formulated on the basis of the pros and cons affecting the entire class. Figure 2 represents not only the composition of the agency's workload in terms of the relative importance of the individual cases and the recurrence of relevant factual patterns, as in Figure 1, but the east-west dimension also reflects the degree to which the managerial mode of decisionmaking is used.

This second element reflecting the degree to which the agency decides in a managerial mode should correspond to the original horizontal scale which reflects the degree of recurrence of relevant factual patterns in the cases before the agency. The two factors differ to the extent that the agency is ignorant of recurring relevant factual patterns. Any noncorrespondence between the two measures suggests that the agency uses inefficient means of decisionmaking and thus increases the cost of regulation. It also suggests that the agency deserves the criticisms of Davis, Friendly, and other advocates of narrowing and structuring discretion.

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41. For a discussion of organizational reasons for agency delegation of authority unaccompanied by decisional criteria to lower level personnel, see Gifford, *supra* note 24, at 461-65.

42. *See* 2 I. SHARFMAN, *supra* note 22, at 367-68 (Commission asserts the prerogative to decide how each incident that comes to its attention should be handled on ad hoc grounds). *See* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 762 (1963) ("convenience and utility may in an urgent case override the particular allocation of roles in the systematic context").

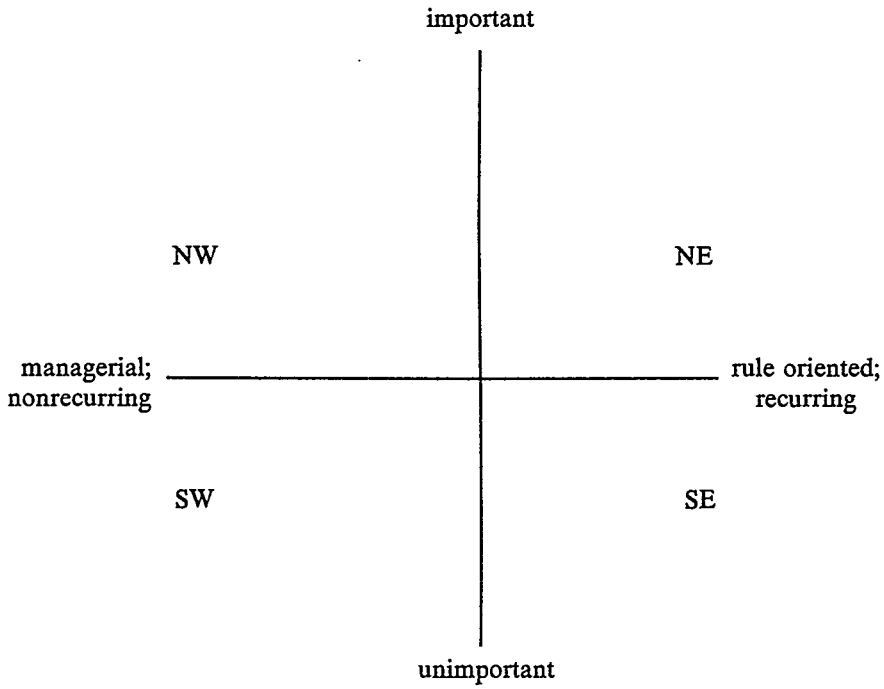

Figure 2

Two other elements of agency operation deserve discussion. The first element is the agency's decisionmaking costs stated in terms of the ratio of the actual amount of decisional resources consumed in the particular decision to the total decisional resources that are available to that agency for all decisions. The second element is the estimated regulatory benefit of each decision, stated in terms of the ratio of the estimated net regulatory benefit produced by the particular decision to the total regulatory benefit produced by all of the agency's decisions.[43] If the agency employs the proper mix of rulemaking, standard making and standard applying, and managerial decisionmaking, then, for any given decision, the ratios of these two measures as applied to the deci-

43. Net regulatory benefit is the extent of the regulatory contribution of the action taken by a regulatory authority to further regulatory goals minus the unintended but unavoidable adverse consequences of the regulatory action. *See supra* note 28. Such determinations, of course, can only be estimates. Attempting to quantify such estimated net benefits tends, in practice, to be difficult. *See, e.g.*, Smithies, *Conceptual Framework for the Program Budget*, in PROGRAM BUDGETING 24, 39-40 (D. Novick ed. 2d ed. 1967) (monetary valuations of future costs and benefits "contain a strong element of artificiality").

sion should be equal regardless of the section of Figure 2 in which the decision falls.

For many agencies, the potential aggregate net regulatory benefit of decisions disposing of cases falling in the NE section is likely to be high. Because decisions in the NE section generally achieve their net regulatory benefit from their precedent-creating or rule-creating effects, these decisions determine results and affect the behavior of subjects not involved in the case. Because it is difficult for factually unique and hence self-contained cases to attain an equivalent regulatory impact, it would not be surprising if for many agencies, the most important cases were concentrated in the NE section of Figure 2. This belief underlies the critiques of Davis, Friendly, and others who desire increased agency efforts to develop standards for decisionmaking.[44] Decisional resources should normally be allocated according to the regulatory benefits that they produce.[45] If an agency's resource allocation were skewed away from rulemaking or precedent-setting decisions, it would suggest that the agency is either one to which the Davis and Friendly critiques do not apply because the patterns of relevant facts do not frequently recur in the agency caseload, or one that neglects its duty to develop decisional standards.

Similarly, decisionmaking in the SE section is easier than in the SW section, because SE section decisionmaking is largely the application of preexisting rules to recurring factual patterns and involves the development of only slight accretions of policy. Also, many potential cases fail to rise to the level of formal disputes because the behavior of regulated subjects may follow rules announced in the precedent-setting or rule-formulating NE section determinations. Therefore, the potential for agency resource expenditure in the SE section cases is lessened significantly whenever a NE section precedent or rulemaking decision removes issues from potential disputes, disputes which otherwise would have fallen into that part of the agency's caseload represented by the SE section.

By contrast, because cases in the SW section contain nonrecurring fact situations, that type of caseload is not reducible by agency efforts to issue rules or precedents. Agencies with caseloads composed of

44. *See supra* notes 1-8, 20-21 and accompanying text.

45. Professor (now Judge) Richard Posner has pointed out that apparently minor cases may contribute "disproportionately" to the achievement of regulatory goals. Posner, *supra* note 28, at 311. Accordingly, an agency which rationally attempts to maximize regulatory goals tends to devote more resources to relatively minor cases than seems appropriate to superficial observers. *Id.* These observers may then criticize the agency for misallocating its resources.

many SW-type cases, therefore, will find it exceedingly difficult to reduce their costs of operation.

D. Administrative Agency Critics and Caseload Types

1. *Confining Discretion*

Criticisms of administrative behavior which focus upon the failure of many agencies to develop standards and rules that reduce the amount of discretionary decisionmaking in their operations appear, upon analysis, to be applicable primarily to agency caseloads falling within the NE and SE sections of Figures 1 and 2. Since the NW and SW sections contain cases in which factual patterns tend not to recur, the development of standards or rules for those cases does not seem feasible. Davis and Friendly, however, would probably contend that the scope of the NE and SE sections is in fact larger than the agencies which they criticize perceive. They would argue that factual regularities recur within cases that these agencies treat as belonging to the NW and SW sections. They would urge each of those agencies to examine its cases more carefully, for if it did, it would uncover as yet unobserved factual regularities. In other words, these critics recommend that agencies reconsider their caseloads in light of the frequency with which relevant factual patterns recur. If agencies did reconsider their caseloads in this light, they would find that many cases that the agency presently believes fall within the NW and SW sections in fact fall within the NE and SE sections.

2. *The Problem of Delegation*

Landis and Davis have criticized the failure of agencies to delegate authority to subordinates.[46] They argue that the policymaking echelons of many agencies dissipate resources by spending too much time deciding particular cases.[47] These critics fault agencies for overusing the managerial mode of decisionmaking.[48] The delegation they urge seems to require that the delegating agency concomitantly formulate decisional standards to impose upon subordinate personnel.

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46. *See* 1 K. Davis, *supra* note 15, § 3:17, at 218-19 (citing a presidential speech and congressional statutes favoring subdelegation); Staff of Subcomm. on Admin. Practice and Procedure, 86th Cong., 2d Sess., Report on Regulatory Agencies to President-Elect 65 (Comm. Print 1960) (J. Landis, author) (critiquing the lack of coherent delegation policies in government agencies) [hereinafter cited as Admin. Practice and Procedure].

47. *See, e.g.*, 1 K. Davis, *supra* note 15, § 3:17, at 218 ("unimportant details occupy far too much of the time and energy of [top-level] agency members") (quoting President Kennedy).

48. *See supra* note 42 and accompanying text.

An increase in delegation, accompanied by a set of decisional standards, would affect the cases falling within the SE section. Thus, a contention that an agency has delegated decisionmaking authority without sufficient standards seems to be a claim either that the agency has improperly retained an ad hoc mode of decisionmaking of many cases falling into the SE section, or that the agency has erroneously perceived many cases as falling within the NE section, whereas the limited individual significance of these cases actually places them in the SE section.

The inability of an agency to supply detailed decisional criteria to subordinates does not mean that the agency ought not to delegate. Indeed, an agency may be unable to supply such detailed criteria even after a delegation has been in effect for some time. Hence, many agencies that refuse to delegate remain vulnerable to criticism. In fact, the SW section contains cases with minimal individual significance, and which, therefore, ought not be decided by high level agency members. Yet, the cases falling into that category tend to lack recurring factual patterns, and thus are not susceptible to governance by precisely drawn rules. For cases falling into this category, the agency can do little but delegate decisionmaking authority without meaningful standards. For caseloads of this type, the best that the agency can do is to employ subordinate personnel whose judgments are mature and considered. Agency responsibility here consists largely of the careful selection of personnel who are entrusted with decisionmaking power.

The police, an institution sometimes criticized for failure to formulate adequate rules to govern the behavior of its personnel, may be an agency whose basic workload is heavily weighted with SW section cases. Many situations requiring decisions by police officers may not have recurring factual patterns and thus are not susceptible to governance by rules.[49] Decisions made in each of these section SW situations

49. One student of police behavior states:

> [T]he exercise of discretion seems necessary in the current criminal justice system for reasons unrelated to either the interpretation of criminal statutes or the allocation of available enforcement resources. This is because of the special circumstances of the individual case, particularly the characteristics of the individual offender which "differentiate him from other offenders in personality, character, sociocultural background, the motivations of his crime, and his particular potentialities for reform or recidivism." The infinite variety of individual circumstances complicates administration by mere application of rules.

W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 71 (1965) (footnotes omitted) (quoting Glueck, *Predictive Device and the Individualization of Justice,* 23 LAW & CONTEMP. PROBS. 461, 461 (1958)). *But see* DISCRETIONARY JUSTICE, *supra* note 1, at 80-96 (police should make policy through rulemaking). Professor Davis, however, candidly acknowledges that police officers need significant amounts of discretion to deal with circumstances that are unique

have minimal societal significance. Police organizations recognize these characteristics of their workload and therefore delegate decision-making to officers on patrol. Those organizations do not attempt to circumscribe those delegations with rules or standards, other than conclusory ones.[50]

II. A PRELIMINARY APPLICATION OF THE CONCEPTUAL FRAMEWORK: THE EVOLUTION OF STANDARDS AND THE PROCESS OF "MUDDLING THROUGH"

The conceptual framework of regulatory discretion developed in section I may be used to analyze commentary on regulatory discretion. An example of this application may be seen in appraising the Friendly and Davis model of regulation in which agencies gradually develop decisional standards.[51] This model assumes that agencies gradually perceive regularities in the factual patterns of the cases and the agencies continuously adjust to these perceptions to react to them in a consistent way. As was explained in section I, however, the patterns of relevant facts do not always recur in an agency's caseload. Consequently, the Friendly and Davis model is not always applicable.

Friendly's famous critique of the federal regulatory agencies can also be used to illustrate the application of the conceptual framework of regulatory discretion thus far developed. Friendly faulted the Civil Aeronautics Board (CAB) for its inconsistent analyses of the role of competition in route and certification decisions.[52] Friendly studied the Board's principal decisions from 1938 through 1961. During that period, the CAB, according to Friendly, shifted course a number of times and never developed a thorough understanding of the workings of airline competition.[53] The CAB, accordingly, never produced a set of standards or decisional guides which it was willing to follow for any substantial period. Friendly concluded that:

> [T]he Board should have conducted regular studies of the benefits

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and nonrecurring. *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 129 (1976) (rules for police should not impair individualizing).

50. Professor Davis points out that the formulation of rules that reflect the variety and complexity of the circumstances that police officers are likely to encounter may themselves be so complex as to be useless to police officers of average skill and training. *See* K. DAVIS, *supra* note 49, at 129 (rules must be short and simple enough for use by ordinary patrolman).

51. *See supra* notes 19-21 and accompanying text.

52. *See* H. FRIENDLY, *supra* note 21, at 74-105 (detailing the changes in the CAB's treatment of issues from 1938 to 1961).

53. *See id.* at 105 (agency failed to understand its area of regulation).

> and costs of competition and then utilized the experience of the past as a guide to what might reasonably be anticipated with the traffic and equipment of the future. Above all it should have written clear, consistent, reasoned opinions or policy statements—facing up to problems rather than sweeping them under the bed, and regularly informing the Congress, the industry, and the public just what it was doing with the nation's air route structure and why, rather than being all things to all men and ultimately satisfying none except itself—if, indeed, it really did that.[54]

Friendly thus attributed the Board's waffling on the competition question to its lack of adequate information. This lack seems to be attributable to the CAB's information collection and information evaluation mechanisms.

The fault that Friendly attributed to the CAB is related to the faults that other critics attribute to other regulatory agencies: failure to plan; failure to anticipate industry developments; and failure to make effective use of rulemaking.[55] All of the CAB's failures and similar failures by other agencies are manifestations of the same underlying deficiency. All are traceable to the agency's failure to garner adequate information about the subject matter which it is charged with regulating.

An agency that purports to regulate when it possesses limited information about its subject matter behaves in the "muddling" way that Professor Lindblom so brilliantly describes.[56] The agency accepts basic patterns and imposes change only incrementally.[57] If a change produces undesirable results, then the agency slightly enlarges the scope of its search for an alternative. If the change produces desirable results,

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54. *Id.* at 104-05.

55. *See* ADMIN. PRACTICE AND PROCEDURE, *supra* note 46, at 18, 44 (critiquing the lack of coherent delegation policies in government agencies); R. NOLL, REFORMING REGULATION 93-94 (1971) (agencies not inclined to evaluate industry and agency performance); Hector, *Problems of the CAB and the Independent Regulatory Commissions,* 69 YALE L.J. 931, 932 (1960) (planning and policymaking by commission "accomplished with appalling inefficiency"); Minow, *Letter to President Kennedy, Suggestions for Improvement of the Administrative Process,* 15 AD. L. REV. 146, 147 (1963) (lack of effective policymaking results in inconsistent decisions).

56. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADM. REV. 79 (1959) [hereinafter cited as Lindblom, *Muddling Through*]; Lindblom, *Policy Analysis,* 48 AM. ECON. REV. 298 (1958). *But see* Dror, *Muddling Through—Science of Inertia,* 24 PUB. ADM. REV. 156 (1964) (questioning the universal applicability of Lindblom's model of decisionmaking); Hirschman & Lindblom, *Economic Development, Research and Development Policy Making: Some Converging Views,* 7 BEHAVIORAL SCI. 220-21 (1962) (contrasting Lindblom's view of policymaking as a generally remedial process with Hirchman's emphasis on the need for prospective analysis in economic policymaking).

57. *See* Lindblom, *Muddling Through, supra* note 56, at 79.

then the agency continues in this incremental mode. The significant premise of this approach to decisionmaking lies in the safety attached to successful past experience: if everything has worked satisfactorily in the past, then future catastrophe can be avoided by staying close to what has already proven successful.

A difficulty with a "muddling through" approach arises when industry circumstances change drastically, rendering past regulatory experience obsolete. Similarly, another difficulty with this approach arises when cases coming before the agency do not manifest recurring fact patterns. Absent significant factual repetition, the agency's experience in handling one regulatory problem does not prepare it to handle another.[58] As a result, the agency does not learn from its prior experience. The agency is unable to experiment, introducing gradual and incremental changes, because the vast disparity in the factual patterns of its cases depreciates the value of using its prior experiences as sources of information.

The deficiencies of the "muddling through" mode of decisionmaking are dramatically illustrated by the CAB's failure during forty years of airline regulation to understand and replicate by regulation the impact of a competitive market.[59] Historically, a powerful argument for deregulation was that it would permit the airlines to limit the number of flights and thereby reduce the number of unfilled seats on each flight. As airlines competed for passengers to fill the seats on large airliners, prices would decrease. Patrons enticed by the low fares would fill the planes to capacity, and unit costs per passenger would fall. Airlines would incur lower costs and passengers would pay lower fares. Yet, despite its continued waffling on the competition issue, the CAB never seems to have attempted to employ a competitive model as a standard by which to assess the effects of its regulatory decisions.[60]

58. *Cf.* C. PERROW, COMPLEX ORGANIZATIONS: A CRITICAL ESSAY 172 (2d ed. 1979) (stressing that control of premises of decisions is the problem for organizations); C. PERROW, ORGANIZATIONAL ANALYSIS: A SOCIOLOGICAL VIEW 60 (1970) (when manufacturing processes undergo extremely rapid and frequent changes, useful generalizations about safety factors are unlikely); W. BENNIS & P. SLATER, THE TEMPORARY SOCIETY 56 (1968) ("[b]ureaucracy's strength is its capacity to manage efficiently the routine and predictable").

59. *See* W. FRUHAN, JR., THE FIGHT FOR COMPETITIVE ADVANTAGE: A STUDY OF THE UNITED STATES DOMESTIC TRUNK AIR CARRIERS 169 (1972) (until at least 1971 the CAB was concerned more with carrier bankruptcies than with the capacity problem which was the main issue of competition in the industry).

60. *See, e.g.*, COMM'N ON LAW AND THE ECONOMY, AM. BAR ASS'N, FEDERAL REGULATION: ROADS TO REFORM 36 (1978) ("the CAB's staff has described the results of the board's carrier selection processes as 'random' ").

Lindblom's conception of "muddling through" was intended as a substitute for more "rational" models of decisionmaking in which officials select the best decision from an exhaustive inventory of possible solutions.[61] Lindblom quite correctly points out that fully rational decisionmaking models are unrealistic as either descriptions of, or norms for, actual regulatory decisionmaking because decisionmakers never have complete information.[62] Most of the time, they have little information beyond the past history of the subject and their own dealings with it. "Muddling through," then, is intended to be both a descriptive model of how actual decisions are made and a normative model indicating how an agency could make good decisions with incomplete information.

It is apparent, therefore, that the "muddling through" model of decisionmaking is inappropriate for situations when an agency cannot obtain information needed to decide future cases from its experience with past cases.[63] The model is inappropriate because of the variety of factual patterns in the cases coming before an agency for decision, or because of significant change in an industry. In these circumstances, adequate regulation requires an agency to collect and evaluate significant amounts of information about the regulatory setting in which it must act, beyond the information of the particular facts of the case before it and the information it has collected from deciding past cases. Indeed, in the situations described, the agency must collect information extensively, in the manner in which it would proceed were it to be engaged in rulemaking.

March and Simon have pointed out a flaw in the decisionmaking process that makes it even more difficult to gather needed information.[64] They assert that when the managers of an organization become deeply involved in day-to-day decisionmaking, they frequently lose the time and perspective needed to take a long view of the organization's operations. Hence, they become unable to plan, especially for major contingencies.[65] The phenomenon identified by March and Simon is related to the CAB behavior described by Friendly. By regulating on a

61. Lindblom, *Muddling Through, supra* note 56, at 80.

62. *Id.* at 81.

63. An agency may lack the necessary information because of the variety of factual configurations in the cases coming before it for decision or because of the occurrence of significant changes in the regulated industry.

64. *See generally* J. MARCH & H. SIMON, ORGANIZATIONS 172-210 (1958) (how organizational dynamics affect innovation and planning).

65. *See id.* at 185 ("[d]aily routine drives out planning").

case-by-case, incremental basis, the CAB lost sight of the long view of airline operations.

For agency decisions to constitute a process through which standards gradually emerge, not only must the cases contain significant regularities but the agency must perceive these regularities. These regularities must not be offset by the occurrence of factors that significantly affect the agency's ultimate evaluations. Regularities in the factual patterns must not be offset by overriding changes in the industry which render obsolete the standards that would otherwise emerge.

Absent relevant regularities, an agency may devise standards by collecting and evaluating information that comes from sources beyond those normally relied upon in an adjudication. Collecting information concerning the technological state of the industry and assessing the implications of the developing technology may enlarge an agency's understanding of the industry's problems. In this way the agency increases its awareness of and sensitivity to the dynamics of industry operation and development, as opposed to the static snapshot perception that an adjudicative record may produce.[66] From this enlarged understanding, an agency may approach regulatory governance in ways geared to present and anticipated industry changes.

III. THE JUSTIFICATION OF DECISIONS: CIRCUMSTANCES AFFECTING THE OCCURRENCE AND THE EXTENT OF JUSTIFICATION

Agency decisions may be classified by the extent to which they rely on a class justification (an analysis of a set of facts common to a class of cases), and by the extent to which agency decisions rely on a unique justification (an analysis of the facts of a particular case). Additionally, agency justifications may be classified by the elaborateness of their logical structure.

Figure 3 includes these two measures superimposed along the horizontal and vertical axes of the previous figures. This superimposition illustrates two assertions. First, an agency in "important" cases is likely to provide a relatively elaborate justification for its action, often in an

66. This approach resembles the "mixed scanning" approach proposed by Professor Etzioni. For descriptions of the mixed scanning approach, see A. ETZIONI, THE ACTIVE SOCIETY 282-305 (1968). *See also* Etzioni, *Mixed-Scanning: A "Third" Approach to Decision-Making*, 27 PUB. ADM. REV. 385, 389 (1967) (explaining how the mixed-scanning approach includes some elements of both the rational model and incremental model by collecting information in complete detail for a few areas of concern).

opinion accompanying its decision. Second, an agency, in "unimportant" cases tends to justify its actions, if at all, by succinct references to rules, precedents, or prior practice.

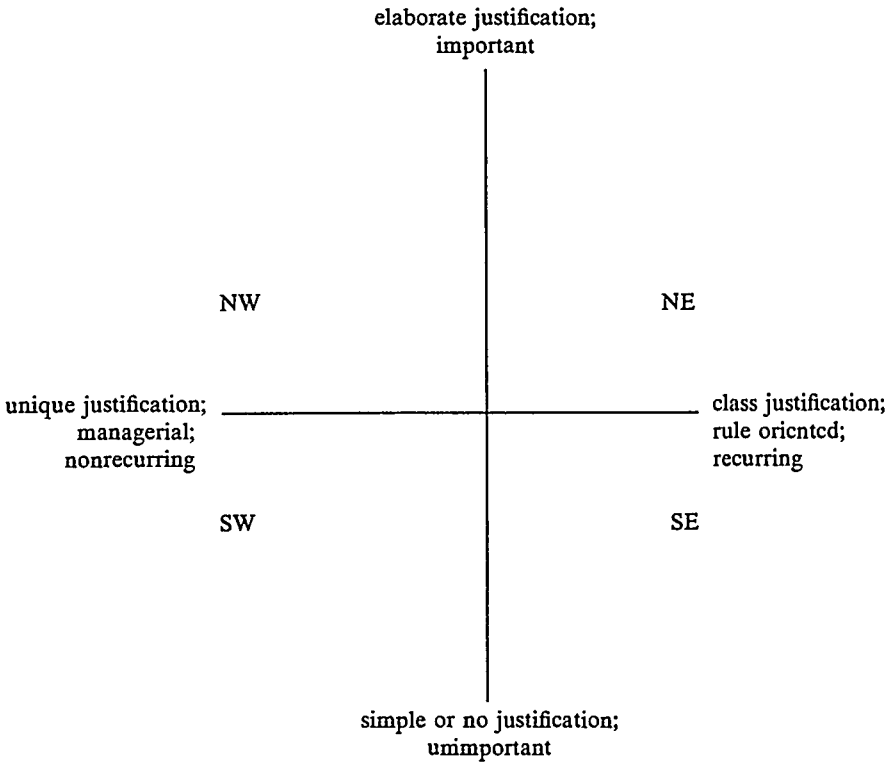

Figure 3

When an agency approaches an area in which it believes the relevant facts are likely to recur, and that the regulatory policy in its aggregate effect is "important" to the goals of the governing statute, the agency tends to announce its policy either in a "rule" or in an opinion, which, because of precedential value, performs a similar function. Because the rulemaking decision or the issuance of the precedent-setting decision effectively sets the criteria for the treatment of future behavior, the initial agency decision announcing the rule or establishing the precedent is necessarily more important to the achievement of regulatory goals than decisions applying that rule or using the decision as precedent. In this situation the original decision falls higher on the vertical scale than do the later decisions applying the standard or precedent.

Both the initial rulemaking or precedent-setting decision and its subsequent applications tend to fall to the right on the horizontal scale.

One may expect elaborate justification even in important cases that do not contain recurring factual patterns, *i.e.*, do not have significant precedential effect. This is true so long as the disposition of each case by itself helps significantly to further regulatory goals. This expectation is partly due to procedural constraints (namely, the agency may be obligated by law to provide a justification), and partly because the agency may have assembled its workload to make such a justification easy. It is also so partly because the substantial impact that agency disposition of such a case will have on an affected private party is likely to induce that party to employ the available procedures to force the agency to respond in detail to his objections and defenses.

On the lower part of Figure 3—where the decisions of lesser importance fall—decisions do not tend to be elaborately justified. Where the relevant factual patterns tend not to recur, decisions cannot be convincingly justified by references to rules or precedents, because neither rules nor precedents are formulated for cases falling in the western part of Figure 3. Moreover, officials charged with dealing with these cases may experience pressures to dispose of them without elaborately justifying their decisions. These pressures are the result of the relative unimportance of each of these decisions, the frequency with which these cases are likely to arise and the correspondingly heavy caseload of the deciding officials,[67] the limited avenues of formal recourse, and the often limited economic resources available to adversely affected persons to pursue such procedural routes of redress as are formally available. The justifications provided by the agency will tend to be one of a small number of stock justifications. Forwarding such stock justifications may be the normal practice, for example, of arresting officers[68] completing the required police report, welfare administrators making

67. The disposition of a heterogeneous caseload would involve more time and effort than the disposition of a homogenous caseload of equal size because the experience of deciding particular cases is less transferable to other cases in the former context than in the latter.

68. Police work requires large numbers of individual decisions, each of minimal social importance. Many of these decisions involve nonrecurring fact patterns, and almost all of them are made outside the constraints of formal procedures. For these reasons, police decisions are an example of "unimportant" official decisions, which are not governed by rules and which in general tend not to be elaborately justified, namely, the kind of decisions which fall in the SW section of Figure 3. While many police decisions are ungoverned by rules, many do, nevertheless, fall into recurring factual patterns. In such instances, it is incorrect to assume that because formal rules do not exist, these decisions are totally unguided. The officer's experience and the advice which he receives from fellow officers tend to provide guides to the conduct of police officers on patrol. *See generally* Gifford, *Decisions, Decisional Referents, and Administrative Justice*, 37 LAW

adverse decisions, and immigration officials[69] deciding questions pertaining to the eligibility of persons to enter the United States.

Low level personnel should decide cases when heavy caseloads consist of individual cases of small significance and recurring factual patterns. Those personnel will probably be guided in their decision-making by rules that have been prepared by officials on the middle or lower rungs of the agency hierarchy. When low level bureaucrats are charged with deciding large volumes of cases, recurring issues not governed by such rules will probably be decided on the basis of prior practice. Those low echelon officials will probably not manifest much flexibility in their approach to cases, nor will they provide elaborate justifications on the merits for their decisions. Caseload pressures and an inability to incorporate their experience into formal governing rules would prevent them from offering elaborate justifications. In short, decisions of this type will tend to be justified by precedent or rules; justifications on the individual merits of particular cases will occur infrequently; and deviations or flexible responses to novel questions will be few.

Figure 1 indicates the areas in which rules and standards might be expected to develop most easily and where they might be expected to develop with difficulty or not at all. Figures 2 and 3 indicate that the formulation of standards in the manner visualized by Friendly and Davis is probably further restricted to the more important cases and largely to those that are decided in the context of formal proceedings. To the extent that justifications either are not made or are not elaborate enough to distinguish and reconcile prior decisions, the process of gradual standard development does not often occur. Figure 3 and its ac-

& CONTEMP. PROBS. 3, 22-26 (1972) (discussion of processes through which interaction with colleagues tends to generate decisional criteria).

Professor LaFave has found that descriptive criteria can be formulated and applied to police behavior and can predict behavior in some identifiable areas. *See* W. LAFAVE, *supra* note 49, at 83-152. Of course, the areas in which officers draw upon their experience or the absorbed advice of their colleagues for assistance are or may be areas in which relevant fact patterns do recur, but in which the combination of experience and advice could not be reduced to written rules or guides. This is because the complexity of the factors, the difficulties of ascribing weights to those factors, and the presence of sporadic and unpredictable other factors impose modifications upon the course of conduct actually pursued.

When superior officials lack the information possessed by their subordinates, or when their attempt to incorporate that information into a set of rules or standards would prove confusing to those subordinates, an attempt at rulemaking by the superiors would be misplaced. In such circumstances, rules would tend to lower the quality of subordinate behavior.

69. *See* DISCRETIONARY JUSTICE, *supra* note 1, at 104-05 (Immigration and Naturalization Service provides reasons for denial of applications through a mechanism which allows the INS to select one or more pre-stated rationales).

companying analysis, by classifying various cases, reveal why the process of gradual development of standards may not occur on the lower bureaucratic levels. It does not occur because of the interaction of heavy caseloads, individually insignificant cases, bureaucratic rigidity, and unaggressive regulatory subjects. As explained above, however, the experience and practice of lower echelon personnel may establish decisional standards. These standards, however, often are not incorporated into formal rules because the lower echelon personnel, who have developed the practices based upon their own and their colleagues' experiences, usually lack the authority to formalize their practices. Moreover, their superiors cannot incorporate these practices into formal rules because they often lack the experience-based information that underlies those practices. Figure 3 also calls attention to another administrative phenomenon: rules that do govern decisionmaking by lower echelon personnel tend to be less flexible than the facts of the individual cases may merit.

IV. PUBLIC DISCLOSURE OR NONDISCLOSURE OF AGENCY DECISIONS

Figure 3, developed to identify various characteristics of agency decisionmaking, will now be given an additional dimension to symbolize the extent to which agency decisions are open or public as opposed to closed or secret.

Figure 4 is a three-dimensional illustration that symbolizes, as the height on the vertical scale increases, the increased degree of openness of an agency decision.

A. Applications of the Openness Dimension

1. *Behavioral Standards*

Agencies responsible for formulating and developing behavioral standards have incentives to publicize each new behavioral requirement, because no one can follow such standards unless one knows of their existence and content. To the extent that these behavioral standards are enforced by lower echelon officials, superiors in the agency must make the standards known to both lower ranking enforcement officials and the regulated public. Cases using standards designed to regulate future behavior tend to fall to the east on the two-dimensional grid because they necessarily apply to recurring sets of facts. Agency

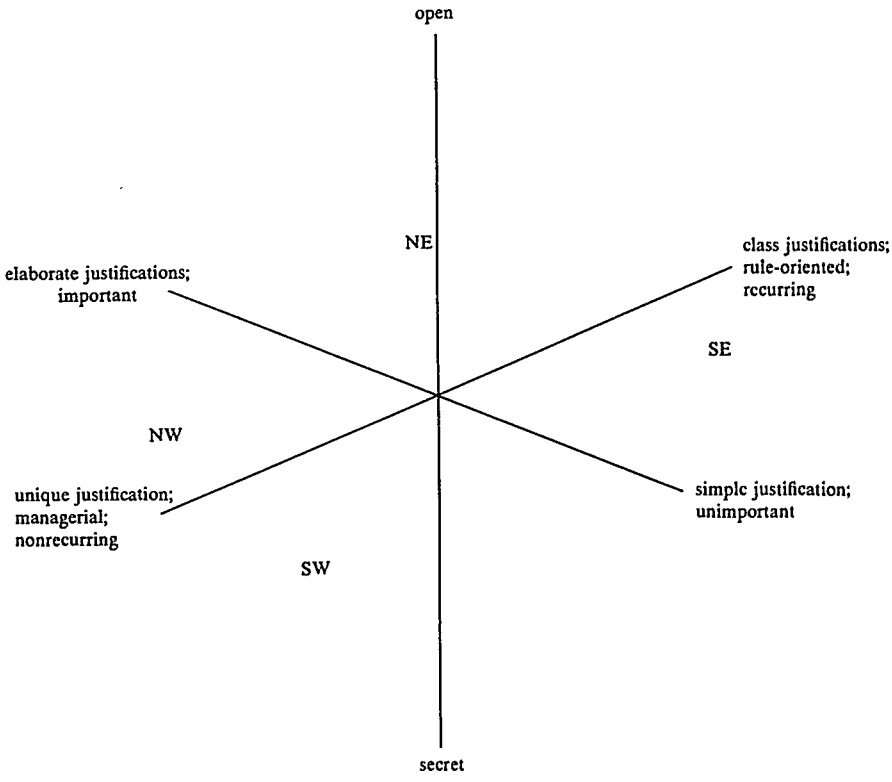

Figure 4

decisions that adopt the standards tend to fall in the northern portion of the grid (namely, the NE section), while the official actions taken in enforcing or applying them will tend to fall in the SE section of the grid. Because the standards will be publicized to serve their normative function, they fall in the higher regions of Figure 4 (the higher regions of the NE section).

2. *Leniency Standards*

Agencies formulating standards that provide lenient treatment for first offenders or minor infractions may keep those standards secret so as not to encourage violations.[70] Because these standards are generalizable and hence of significant regulatory importance, decisions adopting them would fall in the northern portion of Figure 4. And because they would tend to apply to cases whose relevant facts recur they would fall in the eastern part of that illustration. Decisions adopting those stan-

70. *See* Gifford, *supra* note 24, at 435 (uncertainty about the applicability of laws can be used as a regulatory device).

dards also fall in the lower portion of the vertical scale because they would be kept secret.

3. *Examples from the Chicago Police Department*

a. *Embedded organizational norms*: Davis, in a study of the Chicago Police Department, found that police officers of almost all ranks believe that they are governed by a norm that requires them to enforce all laws fully.[71] Although almost all officers also recognized that the department lacked the resources to carry out this full enforcement, they also believed that the department had no right to designate specified laws for nonenforcement.[72] Most police officers believed that such a decision would be a political one within the exclusive province of the legislature.[73]

Higher ranking officials in the department could formulate criteria to allocate limited police resources. But the higher in the department hierarchy that a decision about allocating resources is made, the greater would be its impact on police behavior because of its wide scope. Thus, the higher in the department hierarchy the decision is made, the more the decision appears to violate the two basic norms governing police behavior: full enforcement of all laws and the avoidance of political decisions.[74] These norms both discourage high ranking police officials from allocating resources by categories of offense and discourage public disclosure of any such decisions actually made. Moreover, the higher in the department hierarchy such a resource-allocation decision is made, the more vulnerable to public discovery are those decisions. Hence, the police officers who make the decisions would be more vulnerable to criticism for violating basic department norms.

Organizational rigidity extends even further. Middle level police officials do not make decisions about nonenforcement, because those officials believe (correctly) that their superiors adhere to the general norms mandating full enforcement and forbidding political decision-making. If these middle level officials were to make a nonenforcement decision, they would be subject to disciplinary action by their superiors. The police example thus illustrates how embedded organizational

71. K. DAVIS, POLICE DISCRETION 1, 34 (1975) [hereinafter cited as POLICE DISCRETION].

72. *Id.* at 34, 90.

73. *Id.* at 91-92.

74. Most police officers instinctively accept the argument that the police force is a subordinate agency and does not have the "power to undo what the legislative body does." *Id.* at 92. Thus, police officers do not feel that it is within their province to make the political decision of changing the law by not enforcing what a legislative body has ordered enforced.

norms may sometimes preclude certain types of rulemaking and dictate that a major decision to misallocate resources by default be kept secret.

b. *Avoidance of public criticism*: Davis' study of the Chicago Police Department revealed that almost all police officers did not make arrests for the possession of small amounts of marijuana.[75] The police department hierarchy felt unable to sanction the no-arrest policy not only because it feared that such a nonenforcement decision would constitute a forbidden political decision, but also because the department had an incentive to deny the practice or at least to be ignorant of it. Public admission of the practice would expose the department to the protestations of large numbers of citizens who expect the police to enforce the marijuana laws fully.

c. *The need for organizationally directed responses*: Davis criticizes the reluctance of the Chicago Police Department to admit that the marijuana laws were not being fully enforced. Because that (nonenforcement) practice rises to a level of major political importance,[76] Davis believes it ought to be both publicized and subjected to the scrutiny of affected and concerned groups and to the political pressures that those groups could bring in favor of an opposite policy.[77] Yet Davis' criticism fails to address adequately the underlying problems that must be resolved in order for the police to change their behavior.

Davis did not deny that the department has substantial incentives not to publicize the nonenforcement practice in question—indeed, not to admit at official levels that such a practice exists. Organizational analyses useful in developing strategies to remove or lessen these incentives are needed.

One approach might be to redirect political pressures toward the legislature. By openly admitting that police resources are inadequate for full enforcement of all laws, the legislature might lessen the pressures upon the police to hide or obscure nonenforcement practices. But larger political problems embedded in the mechanics of image-making, pressure-group politics, and the general art of election-winning make such behavior by the legislature unlikely.[78] Indeed, legislatures often

75. *Id.* at 39, 156-57.

76. *See supra* note 74.

77. *Id.* at 106, 156-58.

78. *See, e.g.*, A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 51-74 (1957) (economic theory of decisionmaking in which legislature increases expenditures until the vote gain of the marginal dollar spent equals the vote loss of the marginal dollar financed).

intentionally use strikingly vague phrases when delegating enforcement responsibilities to regulatory agencies. This reduces the legislature's exposure to various pressure groups and deflects those pressures to the regulatory agency to which the delegation is made.[79]

d. *Identifying these decisions by types*: If the Chicago Police Department had gone public with its decision not to enforce all laws fully, the decision would have fallen into the upper region of the NE section, because (1) it was the Department's publicly proclaimed position, (2) it was of great social and regulatory importance, and (3) it applied to cases consisting of recurring facts defined by statute as criminal. The actual decision, however, of the Chicago Police Department not to take responsibility for allocating the Department's limited enforcement resources falls into the lower regions of the NE section of Figure 4 because that decision was secret and the Department did not want to acknowledge it. That decision, moreover, was a vast delegation of power to lower echelon personnel, allowing them to decide how to allocate the Department's resources. One result of that type of delegation, as reported by Davis, is that officers on the street tend to decide independently not to make arrests for the possession of small amounts of marijuana.[80] These decisions, limiting enforcement of laws governing marijuana possession, are appropriately included in the SE section of Figure 4 because they deal with recurring factual settings and are, individually, of trivial social and regulatory importance. Collectively, however, they constitute a descriptive rule of how the police department operates with respect to marijuana possession. That descriptive rule is appropriately placed on the right side of the illustration, approximately on the border of the NE and SE sections in terms of social and regulatory importance, and at midrange depth because the rule, and the aggregate of decisions constituting it, while not directly publicized, are nevertheless known to most persons directly affected by it.

4. *Preserving Flexibility to Handle the Unforeseeable*

Agencies that adjudicate matters with an eye toward future adjudications involving similar issues, albeit in varying factual contexts, may say as little as possible in present decisions in order to preserve flexibility for addressing later cases. In this way agencies can prevent any

79. *See, e.g.*, Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 634 (1944) (Rutledge, J., dissenting) (Congress "resolved" controversial issue by delegating task to administrative official).

80. POLICE DISCRETION, *supra* note 71, at 6-7.

possible embarrassment resulting from decisions that conflict with standards or principles enunciated in the earlier decisions. Louis Hector, a former member of the CAB, pointed out this phenomenon. His own agency directed its opinion writing staff to avoid any nonessential pronouncements in order to maximize the CAB's freedom to dispose of future cases as it saw fit.[81] Friendly noted cases in which the CAB did at first spell out standards, only to decide later cases in ways that appeared inconsistent with those standards.[82]

From the information provided by Hector and Friendly, it appears that the CAB either was actually or believed itself to be insufficiently informed to decide the issues before it. Subsequent cases involved unanticipated new facts, which necessitated a changed approach. The CAB continually revised its decisional approach to the competition question in light of new facts discovered in each new case. The agency handled these cases as if they belonged in the eastern section of Figure 4, in the areas reserved for cases composed of recurring relevant facts, but the agency's limited vision prevented it from recognizing the full set of relevant decisional factors. Had the agency been more adequately informed, it would have avoided deciding cases as if they fell into the NE section of Figure 4, when they actually fell in the NW section or on the border between the two sections. To the extent that the CAB intentionally avoided providing a rationale for its actions (in the ways described by Hector), the agency knew that it was dealing with cases composed of recurring facts; that was the reason it sought to avoid any explanation that could tie its hands in future cases. In these cases, therefore, the CAB was deciding cases which properly fell into the NE section, but which it wished to treat as the unique type of case represented in the western section of Figure 4. In order to achieve this result, the CAB refused to disclose the actual rationale for its decisions, thereby limiting or eliminating their effects as precedents.

Decisions like these—dealing with sets of facts that an agency recognizes as recurring and in which the agency does not disclose its actual rationale so as not to create a precedent—properly belong in the lower ranges of the vertical dimension of this NE section. The best professional critique may not be to demand that the agency enunciate decisional standards despite its actual or perceived ignorance, but rather to consider the steps to take to alleviate that ignorance. In-depth

81. Hector, *supra* note 55, at 942-43.

82. *See* H. FRIENDLY, *supra* note 21, at 97 (CAB chairman quoted as saying the CAB's philosophy changes day to day).

studies of the operation of the airline industry, its economics, its technology, the processes of technological change, and the process of economic change and continuous planning would have given the agency more usable information. In those circumstances, its opinions might have been more forthright and comprehensive. The standards embodied in those opinions might have better withstood the repeated assaults of industry lawyers in subsequent litigation.

5. *Avoiding Distraction by Overworked Officials*

Davis has discerned a pervasive reluctance by low level officials to disclose decisional standards that they themselves have developed. This reluctance to disclose internally developed decisional standards has affected parole board members,[83] officials examining applications regarding forfeitures of vehicles used in the narcotics trade,[84] and other low level administrators. This reluctance derives from their belief that access to those standards by persons who have been or who will be affected by their decisions will subject the officials to increased challenges about the way they apply the standards.[85]

This perception is one of substantially increased workload. The officials will have to spend time justifying past decisions and countering objections, rather than concentrating on making other decisions. Although the perceived potential for an increased workload may be exaggerated, one cannot dismiss it out of hand. On Figure 4, the standards that these low level officials employ properly fall midway on the north-south (regulatory importance) dimension, to the east on the east-west (fact recurrence) dimension, and at the lower end of the vertical or depth (secrecy) dimension.

Officials who make decisions pursuant to a set of rules or standards which are not available to the public do not employ unconfined or unstructured discretionary power. Their decisions are confined and structured by the set of rules and standards that they are in fact using. They could make their decisions appear more confined and structured, however, if they publicized the rules and standards. To the extent that it is desirable to encourage officials to disclose the previously secret rules and standards used in deciding cases, one should consider what means may reduce the incentives to maintain secrecy.

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83. DISCRETIONARY JUSTICE, *supra* note 1, at 129-30.

84. *Id.* at 109-10.

85. *Id.* at 126-31.

One could reduce that incentive if one could find ways to insulate deciding officials from the need to respond to contentions of dissatisfied or potentially affected persons. One might provide this insulation by routing complaints to officials other than those who made the decisions. A threshold showing of substantial noncompliance with the guidelines might be required before a complaint would officially be taken under advisement.

6. *Avoiding Bureaucratic Rigidity*

A decisionmaking official may occasionally conclude that the merits of an applicant in a particular case are unusually compelling and that a favorable decision will advance the goals of the statutory program. Yet the rules may make no provision for such a decision; indeed, they may literally require the opposite decision. A regulatory agency or upper level official so confronted probably would decide in accordance with the statutory purpose, justifying its nonliteral approach to the statute in an accompanying opinion.[86]

A lower echelon official may not have the same opportunity to justify a nonliteral approach to the rules. Superiors may insist upon literal observance of the rules. This may be partially due to their recognition of their own inability to review such exceptions for coherence and general conformity with the statutory framework and goals. Such an attitude is not to be too quickly condemned; it exhibits a degree of sophistication about the extent of the resources that rational supervision over the administration of flexible rules would entail, and a perhaps correct perception that those resources are lacking. Confronted with systemic inflexibility, a lower echelon decisionmaker may occasionally decide as he believes the merits dictate, but in such cases he will tend not to explain the decision's nonconformity. To do so would merely call attention to the deviant act, possibly causing his superiors to reverse the decision and to issue a reprimand. It is sometimes true that the superiors of such an official may become aware of his occasional flexible applications but tolerate them on the ground that they trust the judgment of that particular official. Selective tolerance preserves the superiors' freedom to correct deviant decisions by other lower echelon officials whose judgment they trust less. Being selectively tolerant in secret also avoids subjecting themselves to the critical judgments of their own superiors that they would experience if they openly approved of their subordinate's flexible applications of the rules. These decisions

86. *See id.* at 110 (publishing rules invites litigation).

fall at the lower levels of the north-south (social and regulatory importance) dimension, toward the midrange of the east-west (fact recurrence) dimension (because it is the unusual facts of the cases that impel the decisionmaker to deviate from the assigned rules), and at the low end of the vertical (secrecy) dimension.

7. *Avoiding the Creation of Normative Rules of Behavior by Lower Echelon Officials*

When an agency deals with large numbers of cases, most of which are individually insignificant apart from their impact as precedent or as behavioral guides for other persons, the agency may delegate decisionmaking authority to large numbers of low echelon personnel. A problem then arises when a low ranking official decides a case that falls into a potentially recurring factual pattern. The problem is exacerbated when the decision in question is a decision about how officials will treat certain behavior that can be planned in advance, for example, in the area of taxation. Public disclosure of the decision made by the low ranking official may lead people to believe that his disposition of the single case manifests agency policy for similar cases. Of course, if the agency knew that the case in question raised policy issues of broad import, then higher ranking officials of the agency would consider the issues and their decision would speak for the agency. But if the agency is not aware that a particular decision has widespread ramifications, it may be too late for his superiors to reconsider the disposition of that case. In the case of decisions delegated to low level personnel, therefore, an agency may thus seek to limit their disclosure to the named parties to the decision and to deny information to the general public. For many years this was the approach of the Internal Revenue Service in rendering private tax rulings.[87] When the decisionmaking of lower echelon officials is kept secret from the general public in order to avoid the creation of behavior-affecting precedent, their decisions fall in the eastern portion of Figure 4, in the lower range of the secrecy dimension, and in the southern half because of the trivial social or regulatory consequences of each decision taken individually.

B. INTERPRETING THE RESULTS

Almost all of the examples in this section fall in the NE section

87. *See* Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles,* 20 INST. ON FED. TAX'N 1, 19-24 (1962) (describing I.R.S. system of private letter rulings, attendant concerns and problems).

and in the northern regions of the SE section of Figure 4. One reason why the agency or responsible officials chose not to publicize the decisions was to avoid the creation of a public precedent. This was true in all of the examples (2) through (7). In examples (2) and (7), the agency sought to avoid a precedent which would have discouraged the regulated public from complying with the goals of the statutory program that the agency was administering. In these two examples, failure to maintain secrecy would have diminished the deterrent effect of penalties and carried the potential for encouraging transactions designed to conform to standards which higher echelon personnel had not approved. In examples (4) through (7), the agency or its officials sought to avoid the creation of a public precedent that could be used to challenge its future regulatory actions.

A second reason for the maintenance of decisional secrecy was organizational: secrecy played a role in overcoming organizational deficiencies such as rule inflexibility, caseloads which allowed no time for decisional explanations or justifications, and delayed review by superiors. Thus, in example (5) officials were not given adequate time to defend the validity of their decisions and there was no way for affected members of the public to complain other than directly confronting the deciding officials. Secret standards enabled these officials to minimize the time spent defending their decisions and disposing of their assigned caseloads. In example (6), where officials decided in a context in which the inflexible rules failed to provide for exceptional situations in which rigid adherence to the rule caused injustice, decisional secrecy was an informal response by a perceptive lower ranking official to oppressive bureaucratic constraint. In example (7), secrecy contains the impact of potentially precedential decisions prior to review by higher ranking officials.

CONCLUSION

This Article identifies particular characteristics of agency caseloads that are or might be expected to be associated with differing decisional approaches or techniques. These characteristics include: (i) those that render agency decisionmaking more or less suitable for the processes visualized by Professor Davis and Judge Friendly in which decisional standards gradually emerge as an agency attains more experience in the disposition of cases; (ii) those that are more or less conducive to delegating authority to subordinates, with or without op-

erational standards; and (iii) those that encourage governmental agencies to act openly or in secret.

Precision and identification have always facilitated the development of understanding. The extent to which a problem is understood usually defines the real potentialities for remedying or mitigating it. The preceding examination of official decisionmaking reveals some of the complexities latent in the generic phenomenon referred to under the labels of "administrative discretion" or "discretionary decisionmaking." Professor Davis, who has been most active in developing techniques for confining, checking, and guiding the exercise of discretionary powers by officials, has himself called for further investigation beyond his own extensive forays into governmental bureaucracies in order to develop criteria for optimizing the mix of rules, standards, and discretionary power available in each decisional context. The several techniques for confining, checking, and guiding the exercise of discretionary power which he has proposed may be more suitable to some categories of administrative caseloads than to others, and to some levels of a bureaucratic hierarchy than to others.

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