

**DANGEROUS CLIENTS:  
A PHENOMENOLOGICAL SOLUTION TO  
BUREAUCRATIC OPPRESSION**

Edward Rubin  
University of Pennsylvania Law School  
March 12, 2005

Ever since Nicolai Gogol wrote *The Overcoat*, in 1841,<sup>1</sup> if not before, people have been aware that bureaucratic government, regularly, if not inevitably, generates a unique form of oppression. But what precisely is the nature of that oppression? After all, pre-bureaucratic government cannot be described as unfailingly kind to ordinary people. There is apparently something about administrative government that breeds a form of oppression that prior governments were unable to discover, but that we perceive as a ubiquitous, virtually inherent aspect of the government we currently possess. But if this form of oppression is so widespread, and so intrinsic, what are the chances that we would ever be able to eliminate it?

This article is an attempt to discern the sources of bureaucratic oppression and suggest some procedural mechanisms that might ameliorate the problem. It focuses specifically on the quotidian oppression to which ordinary individuals are subject in their dealings with the modern administrative state.<sup>2</sup> Part I discusses the sources of bureaucratic oppression, noting that these sources are built into the structure of administrative agencies. Part II then identifies and analyzes three proposed solutions that collectively reflect a wide variety of academic disciplines. The first is the imposition of due process requirements, which is based largely on legal analysis. The second is a shift to client-centered management, which draws on management theory and the sociology of institutions. The third is reliance upon market or quasi-market mechanisms, based on insights drawn from microeconomics. All these approaches suffer from serious limitations, however, particularly because the sources of bureaucratic oppression are so structural in nature. In response, Part III suggests an alternative approach, drawn from phenomenology, psychology and organization theory. Its goal is to alter bureaucratic attitudes by making the agency's clients directly and specifically dangerous to its employees.

---

<sup>1</sup> Nicolai Gogol, *The Overcoat*, in *Tales of Good and Evil* 233 (David Magarshack, trans., 1957)

<sup>2</sup> It does not deal with the oppression of corporate entities, such as business firms. It is not clear whether the idea of oppression has any precise meaning in connection with a corporate entity; if it does, the problems it raises are sufficiently distinct to be usefully regarded as a separate topic.

## I. The Sources of Bureaucratic Oppression

The climactic scene of Gogol's *Overcoat* occurs after the theft of Akaky Akakievich's newly-made overcoat, on which he had lavished his life savings. Akaky, a timid, impecunious government clerk, is advised that if he goes to the police, he will never get his overcoat back because he will be unable to prove that it is his. Instead, he should apply to a higher official, a Very Important Person, who can intercede on his behalf. This Very Important Person, however, has received a visit from a childhood friend, whom he wants to impress, when Akaky appears. After making Akaky wait outside his office for an inordinate length of time, he allows him to come in and state his request. "What do you mean, sir?" he thunders to Akaky. "Don't you know the proper procedure? What have you come to me for? Don't you know how things are done? In the first place you should have sent a petition about it to my office. Your petition, sir, would have been placed before the chief clerk, who would have transferred it to my secretary, and my secretary would have submitted it to me . . ." <sup>3</sup> Further admonitions of this kind reduce Akaky to a state of nervous collapse; he is carried out of the office, succumbs to a fever, and dies.

We are all familiar with the same phenomenon in less melodramatic form. There we stand, on the linoleum floor of a shoddy-looking office, underneath florescent lights suspended from the acoustical tiles on the ceiling. After a half-hour wait, we find ourselves standing across the metal counter from a bored, surly government clerk, who informs us that we have been standing on the wrong line, and that we must go to the back of another equally long, equally slow-moving line. "No," we are told, it can't be helped. "Every one has to follow the same rules. There's nothing I can do about it." <sup>4</sup> The experience is disconcerting in itself, and perhaps particularly disconcerting in a consumer-oriented society where other institutions that deal with individuals, most particularly private firms, strive to provide friendly, cheerful service. <sup>5</sup>

---

<sup>3</sup> Gogol, *supra* note [ ], at 263

<sup>4</sup> See James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 113 (1989).

<sup>5</sup> George Ritzer, *The McDonaldization of Society: An Investigation into the Changing Character of Contemporary Social Life* (1993); Amy Wharton, *Service*

These two incidents, whose consequences range from the tragic to the irritating, reflect several of the basic elements of bureaucratic oppression: status differences, stranger relations, institutional pathologies, and divergent incentives. For purposes of the following discussion, bureaucratic oppression can be defined as action by particular administrative agents that imposes unnecessary and harmful burdens on private parties. This definition refers to a broad range of behaviors; for example, it is not limited to illegal action.<sup>6</sup> It certainly includes an unjustified fine, or a burdensome inspection that violates the agency's own protocols.<sup>7</sup> But it also includes dogged insistence on following the rules when doing so imposes burdens for no purpose, like forcing people to stand in multiple, ambiguously labeled lines, or imposition of formal rules in an excessively abusive and punitive manner, as in Gogol's *Overcoat*.

The definition, however, excludes enactment of a rule, not because rules cannot be oppressive in some ordinary language sense, but because whatever harms rules impose are distinguishable from the harms imposed by individual government agents. Rules are relatively high-profile administrative actions, affecting groups of people, and groups have political means of protecting themselves. A related exclusion is the sense of oppression, again in the ordinary language sense, that results from correct application of a rule, without any other abusive action. Regulatory states necessarily impose burdens on various actors, or deny desired benefits to them, but this by itself

---

With a Smile: Understanding the Consequence of Emotional Labor, in Cameron Macdonald & Carmen Sirianni, *The Service Society and the Changing Experience of Work*, in Cameron Macdonald & Carmen Sirianni, eds., *Working in the Service Society* (1996).

<sup>6</sup> I'm indebted to Martin Shapiro for this point.

<sup>7</sup> Cf. *Marshall v. Barlow's*, 436 U.S. 307 (1978). A factory owner challenged a warrantless administrative search by the fire marshal on Fourth Amendment grounds. The Court held that an administrative search requires a warrant, but that the agency could obtain the warrant by demonstrating that it was following a regular inspection plan, and did not need to show probable cause. Clearly, a factory owner whose property is searched because she is a Republican, or because she criticized the inspecting agency in public, is a victim of bureaucratic oppression. The Court was attempting to address this problem through its warrant requirement. But the search would be oppressive even if it did not require a warrant, or if the factory owner had agreed to it.

cannot be regarded as a problem that needs to be solved. Within its defined category of governmental action, the article is further limited to the bureaucratic oppression of individuals, and does not consider oppression of business firms or other organizations. The reason for this further limitation is simply that the two cases are distinguishable, and that either one is a sufficiently large topic for a single article. Oppression of individuals has been selected because it seems more serious, and because it is more easily described. It is an important enough problem to justify imposition of the proposed solution; whether oppression of firms should be addressed at all, and whether the same mechanism could be used for doing so, is a matter that is left for consideration at another time.

#### A. Status Differences

Government officials have generally occupied high status positions in most societies throughout the course of history. During the early feudal era in the Western world, the social and governmental hierarchy were virtually identical. The king was the head of government precisely because he had the highest social status, that is, he was the feudal overlord of the nobility.<sup>8</sup> The social status of the nobility, in turn, was defined by their position as feudal lords, and this position simultaneously made each of them the official ruler of a territory, or honor, and all who lived within it.<sup>9</sup> With the growth of royal government in the High Middle Ages, Renaissance and Reformation periods, a class of officials who were separate from the

---

<sup>8</sup> Antony Black, *Political Thought in Europe 137-39*(1992); Joseph Canning, *A History of Medieval Political Thought 300-1450*, at 47-59, 93-95 (London: Routledge, 1996); Heinrich Fichtenau, *Living in the Tenth Century* (Patrick Geary, trans., 1991), at 157-64; Otto Gierke, *Political Theories of the Middle Age 30-37*(Frederic Maitland, trans., 1938). The idea that the king ruled by divine right, thereby deriving his authority from God, was not inconsistent with the idea that kingship was defined as the apex of the social hierarchy because this hierarchy was itself regarded as divinely ordered. See Gierke, *supra*; Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1957)

<sup>9</sup> Marc Bloch, *Feudal Society 145-344* (L.A. Manyon, trans., 1961); Fichtenau, *supra* note [ ], at 135-56; F.L. Ganshof, *Feudalism* (Philip Grierson, trans., 1996). As Fichtenau points out, the term "honor" originally referred to an office but came to refer to the property of the nobles during the feudal period. *Supra* at 141.

landed nobility began to emerge, but these officials often had noble backgrounds,<sup>10</sup> and in any case they quickly acquired a high status of their own, which was often formalized by grants of land and titles.<sup>11</sup> The French practice of selling governmental offices had the natural effect of transforming appointed officials into a hereditary nobility.<sup>12</sup>

With the advent of the administrative state and the rapid development of industrial wealth in the late eighteenth and early nineteenth centuries, a much more definitive separation between status and official position occurred. According to Weber's classic definition, bureaucratic government is characterized by full-time employees who are compensated by regular salaries, rather than by the fees they collect.<sup>13</sup> All but the most high-ranking employees are selected on the basis of merit, thus precluding selection based directly on status. Conversely, industrialization shifted the primacy locus of wealth, and ultimately status, away from the landed nobility who exercised governmental or quasi-governmental authority over defined territories, and to a group of persons who, while perfectly content to influence the government in their favor, defined themselves as private

---

<sup>10</sup> Jonathan Dewald, *The European Nobility 1400 – 1800*, at 97-98 (1996); Jonathan Dewald, *Aristocratic Experience and the Origins of Modern Culture: France 1570-1715* (1993); Hans Rosenberg, *Bureaucracy, Aristocracy, and Autocracy: The Prussian Experience, 1660-1815* (1966)

<sup>11</sup> Ernest Baker, *The Development of Public Services in Western Europe 1660-1930*, at 9-11 (1966); James Collins, *The State in Early Modern France* 132-40 (1995); Wolfram Fischer & Peter Lundgreen, *The Recruitment and Training of Administrative and Technical Personnel*, in Charles Tully, *The Formation of National States in Western Europe* 492 (Princeton, N.J.: Princeton Univ. Press 1975); Ellery Schalk, *From Valor to Pedigree: Ideas of Nobility in the Sixteenth and Seventeenth Centuries* (1986).

<sup>12</sup> Richard Bonney, *The King's Debts* 1-28 (1981); Thomas Ertman, *Birth of the Leviathan* 100-110 (1997); Martin Wolfe, *The Fiscal System of Renaissance France* (1972).

<sup>13</sup> Max Weber, *Economy and Society* 956-63, 969-83 (Guenther Roth & Claus Wittich, eds., 1978); see Clive Church, *Revolution and Red Tape: The French Bureaucracy 1770-1850* (1981); Fritz Morstein Marx, *The Administrative State: An Introduction to Bureaucracy* (1957); Fischer & Lundgreen, *supra* note [ ]

persons.<sup>14</sup> These developments, combined with the massive growth of government in the administrative era, produced a group of official functionaries with relatively low social status.

But the precise social status of administrators, and the consequences of that status, are complex.<sup>15</sup> Regulatory officials, who often deal with corporate executives, land owners, or professionals, are in a socially ambiguous position. On the one hand, many of those they regulate, particularly corporate executives, possess higher social status; on the other hand, their authority, their ability to impose sanctions, enhances their status beyond that which their title or salary might suggest. Officials who provide benefits or services, such as welfare workers, social security administrators, teachers, doctors, nurses, and police are located somewhere in the middle of the social hierarchy. In an upper middle class suburb, teachers and police are socially subordinate to those they serve, although they also benefit from the authority of their position, and in many cases, from their professional status. In an impoverished area, whether urban or rural, they are clearly superior.<sup>16</sup> Officials who deal with the poor because of the intrinsic nature of the task, such as welfare workers, are unambiguously superior because they themselves have higher status,

---

<sup>14</sup> E.J. Hobsbawm, *The Age of Revolution 1789–1848*, at 44-73, 202-17 (1962); Patrick O'Brien and Roland Quinault, eds., *The Industrial Revolution and British Society* (1993); Peter Stearns, *The Industrial Revolution in World History* (1993). For contemporary reflections of this mentality, see Milton Friedman, *Capitalism and Freedom* (1962); Robert Nozick, *Anarchy, State and Utopia* (1974).

<sup>15</sup> For discussions of parallel complexities in private enterprise, see, e.g., Stephen Fineman, *Organizations as Emotional Areas*, in Stephen Fineman, ed., *Emotion in Organizations* (2<sup>nd</sup> ed. 2000); Greta Paules, *Dishing It Out: Power and Resistance Among Waitresses in a New Jersey Restaurant* (1991)

<sup>16</sup> A particularly dramatic example of this shift in relative status involves the police, who tend to be service-oriented in wealthy suburban community and enforcement-oriented in an impoverished inner city one. See Jerome Skolnick, *Justice Without Trial: Law Enforcement in a Democratic Society* (2<sup>nd</sup> ed. 1975); S.E. Martin, *Police Force or Police Service? Gender and Emotional Labor*, 561 *Annals Am. Acad. Pol. and Soc. Sci.* 111 (1999). Cf. Barbara Stenross & Sherryl Kleinman, *The Highs and Lows of Emotional Labor: Detectives Encounters With Criminals and Victims*, 17 *J. Contemp. Ethnography* 435 (1989) (detectives exhibit distinctly different demeanors when dealing with suspects than they do when dealing with victims).

and because their clients are automatically placed in a socially subordinate position by the benefits being provided to them.

In short, public officials in the modern administrative state are not automatically superior to those they govern, in the manner of feudal lords or Gogol's Very Important Person, but they are often superior in particular situations. Wherever such superiority occurs, it carries with it substantial opportunities for oppression. This oppression consists of scorn, peremptory treatment, a failure to empathize with the person involved and most seriously, unwillingness to perform the assigned task of benefit distribution, education or protection. It can be obvious and open,<sup>17</sup> or it can be rather subtle,<sup>18</sup> but it is always hurtful, and often harmful to both the individual and the social interest that the relevant legislation was designed to foster.

In his study of the Social Security Administration, Jerry Mashaw observed that retired people were generally treated respectfully and conscientiously.<sup>19</sup> This is consistent with the idea that status differences are partially responsible for bureaucratic oppression. While poor people, unemployed people, orphans, and other recipients of government benefits are generally low status persons – that is, lower than public officials – social security recipients are not. Everyone grows old, including the wealthy, the well-connected and the skillfully vociferous. Moreover, social security is not regarded as welfare, but as a return on payments made by working people, which is exactly what President Roosevelt intended when he crafted the program.<sup>20</sup> These features confer status

---

<sup>17</sup> See Malcolm Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (1978)

<sup>18</sup> See Lucie White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G* in Alex Hurder, et al., eds, *Clinical Anthology: Readings for Live Client Clinics* (1997).

<sup>19</sup> Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983). Roger Noll suggested this example to me.

<sup>20</sup> Francis Perkins, *The Roosevelt I Knew 188-89* 282-85 (1946); Arthur Schlesinger, *The Coming of the New Deal* 308-15 (1959). When told that the employee contribution feature of his plan reflected unsound economics, Roosevelt replied that the taxes were not based on economics, but politics. "We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions and their unemployment benefits. With those taxes in

on social security recipients, and thus serve to secure respectful behavior by the agency.

#### B. Stranger Relations

A closely related problem is that the individual with whom a government official is dealing in the modern administrative state is likely to be a stranger. In the pre-administrative era, the inherent oppressiveness of the status differences between rulers and their subject was ameliorated by the highly localized nature of social control. These interactions and, indeed, virtually all interactions, occurred within the confines of a village or a manor, where the people who were being ruled most likely spent their entire lives. The lord, or, more often, the lord's seneschal or bailiff, was likely to know every person whom he commanded or who applied to him for assistance on a personal basis, as was the parish priest who administered aid and provided education. While ingrown relationships of this sort can certainly lead to antipathy and resentment, there is also a human level of familiarity, and at least the potential for empathetic concern. In any event, members of the local elite were likely to understand the needs of the lower-status people in their village or manor, since the two groups had spent their entire lives together. Moreover, there was no need for the elite to use oppression to assert their social superiority, as do Gogol's Very Important Person and the surly clerk behind the metal counter. The status hierarchy in pre-modern localities was well established and well understood by all concerned.

In modern mass society, government officials who deal with ordinary citizens are almost invariably dealing with strangers. A regulatory official may come to know the executives and attorneys in the firm she regulates, and she may even develop friendly relations with them, particularly if she intends to seek a job at that firm when she leaves the government. But benefits workers, social security administrators, police officers, and medical personnel are typically dealing with large numbers of individuals whom they are unlikely to see again, and even more unlikely to have known before. The numbers of people they must regularly deal with not only render each individual anonymous to them, but also create a sense of being

---

there, no damn politician can ever scrap my social security program." Schlesinger, *supra*, at 308-09.

overwhelmed by work that cautions them against making any effort to reduce this anonymity; to begin giving people individualized attention would quickly make the job impossible to perform.<sup>21</sup>

There is, moreover, a proliferation of functions in the modern state that result from the need to manage mass society, and thus have no pre-modern analogue. Modern people need to obtain driver's licenses, passports, zoning variances, change of address forms, and a variety of other authorizations, each of which requires interaction with the government bureaucracy. In all these relationships, there is no familiarity between the parties, little chance for empathy, and a basic uncertainty that the government official will even understand the real needs of the individual in front of them.<sup>22</sup> Barbara Gutek's leading study of customer relations in business firms concluded that most interactions with customers took the form of encounters, rather than relationships, that is, superficial, instrumentally-oriented interchanges that precluded any real human contact.<sup>23</sup> Interactions between government employees and citizens would appear to display similar characteristics.

It is important, of course, not to romanticize pre-modern times. Familiarity was no guarantee against harsh treatment by one's superiors, and life in a small, insulated town could be stultifying and oppressive in its totality. Cities were generally regarded as places of freedom and opportunity during the medieval, Renaissance and Reformation periods,<sup>24</sup> the famous slogan being that "city air makes one free." By the eighteenth century, these cities had become large enough to offer their residents a certain anonymity, and this too provided an escape from the oppressiveness of ingrown, pre-modern societies. But the freedom and anonymity that modern urban settings offer has never be regarded as including the freedom to receive harsh

---

<sup>21</sup> Joel Handler & Ellen Hollingsworth, *Reforming Welfare: The Constraints of the Bureaucracy and the Clients*, 118 U. Pa. L. Rev. 1167, 1177 (1970)

<sup>22</sup> Michael Ignatieff, *The Needs of Strangers* (1984).

<sup>23</sup> Barbara Gutek, *The Dynamics of Service: Reflections on the Changing Nature of Customer/Provider Interactions* (1995)

<sup>24</sup> See Weber, *supra* note [Economy and Society], at 1236-62. One reason for this view is that the cities were outside the feudal system.

treatment from the bureaucracy. Indeed, administrative government can be seen as an effort to reassert control over people in the more fluid, otherwise unsupervised circumstances of modern life. The point, then, is that familiarity and affective bonds of pre-modern society were not available as a palliative against this new form of control. The freedom that the social circumstances of modernity had conferred on people could be undermined or extirpated by bureaucratic supervision, and the anonymity which had been a component of that freedom now left people alone and unprotected when this supervision turned abusive.

### C. Institutional Pathologies

A medieval lord owed certain obligations to his feudal superior, but in his treatment of the ordinary people on his property he was essentially unsupervised, while his seneschal or bailiff were answerable only to him. The parish priest was part of a large, hierarchically organized institution, but he was also largely unsupervised in his quotidian interaction with his parishioners.<sup>25</sup> Modern administrative agents, however, are part of large, complex institutions, and these institutions often malfunction in a way that produces further forms of oppression. Organization theory has amply documented a wide variety of such malfunctions.<sup>26</sup> For example, the difficulty of managing a large institution, and specifying performance standards to control the action of their hundreds, thousands or tens of thousands of employees often lead them to establish goals whose

---

<sup>25</sup> There were some broad constraints imposed by Christianity that did distinguish medieval society from its pagan predecessor. No overlord, including the king, could indulge in the sorts of public debaucheries and hideous tortures that characterized the Roman Emperors, Gaius Suetonius Tranquillas, *The Twelve Caesars* (Robert Graves, trans., 1957); see George Brauer, *The Decadent Emperors: Power and Depravity in Third-Century Rome* (1967), nor could he break up the families of his dependents.

<sup>26</sup> See generally Ludwig von Bertalanffy, *General System Theory* (1968); Jay Galbraith, *Organization Design* (1977); James March, *Decisions and Organizations* (1988); James March & Herbert Simon, *Organizations*, (2<sup>nd</sup> ed. 1958); John Meyer & W. Richard Scott, eds., *Organizational Environments: Ritual and Rationality* (1983); Walter Powell & Paul Dimaggio, eds. *The New Institutionalism in Organizational Analysis* (1991) W. Richard Scott, *Organizations*, (2<sup>nd</sup> ed. 1987).

natural consequence is to harm the people that they are supposed to help. Welfare and social security workers are often rewarded for minimizing the benefits that they provide, thus saving their department money, rather than for making sure that every eligible recipient receives the intended benefit; police officers are rewarded for making arrests and obtaining confessions, rather than for reducing crime; doctors and nurses at public hospitals may be encouraged to treat people quickly and discharge them, or to discourage them from using the hospital at all, rather than making a thorough assessment of their medical condition.<sup>27</sup>

Perhaps the best-known institutional pathology of governmental agencies is excessive formalism, popularly known as “red tape.”<sup>28</sup> The Very Important Person’s insistence that Akaky file a petition which would be submitted to “the chief clerk, who would have transferred it to my secretary, and my secretary would have submitted it to me” is an immediately recognizable example. The term, however vivid, is not really self-explanatory. It is obviously a metaphor, derived from the time when actual red tape was used to tie up batches of U.S. Federal Court documents.<sup>29</sup> One definition runs as follows: “Red tape refers to government measures that impede job creation and investment opportunities and diminish competitiveness by adding unnecessary, uncoordinated or unjustifiable requirements, restrictions, compliance, implementation or administrative costs to everyday business activities.”<sup>30</sup> This definition itself verges on red tape by committing the closely-allied sin of being written in bureaucratize; in fact,

---

<sup>27</sup> See Herbert Simon, *Administrative Behavior* (1957); Wilson, *supra* note [ ], at 113-36

<sup>28</sup> For official recognition of the term, see National Performance Review, *Creating a Government That Works Better & Costs Less* (1993) (alternatively titled “The Gore Report on Reinventing Government”). The first chapter of the Report, *id.* at 11-41, is entitled “Cutting Red Tape.” In addition, a third title that appears at the top of the title page, but not the cover, is “From Red Tape to Results.”

<sup>29</sup> [www.geocities.com/wcraigjnb/redtape.html](http://www.geocities.com/wcraigjnb/redtape.html) (visited on Jan. 3, 2005) (this being the practice from about 1790 to 1915) [Word for the Wise]

<sup>30</sup> <http://www.redtape.gov.on.ca/english/> (What We Do: What is Red Tape?) (visited on Jan. 3, 2005)

it comes from a government agency, the Province of Ontario's Red Tape Secretariat. Its origin generates a disquieting impression that government cannot try to eliminate "red tape" without simultaneously succumbing to it.

This may well be true; Weber's classic definition of bureaucracy states: "The authority to give commands required for the discharge of [official] duties is distributed in a stable way,"<sup>31</sup> and "The management of the modern office is based upon written documents ('the files'), which are preserved in their original or draft form, and upon a staff of subaltern officials and scribes of all sorts."<sup>32</sup> Insistence that people follow prescribed, written rules, and interact with prescribed, hierarchically subordinate officials, may be intrinsic to the structure of modern administrative government. If so, the crucial word in the Ontario definition, and virtually any other definition of red tape, is "unnecessary." The inevitable rules and restrictions of bureaucracy have an oppressive character, but unnecessary rules and restrictions are truly oppressive precisely because they are additional burdens imposed on citizens for no good reason. Distinguishing the necessary from the unnecessary, however, is likely to be a difficult task. If one opens the typically thick Office Manual or Employees' Manual of a governmental agency, one is unlikely to find a statement that the any particular requirement is unnecessary.

#### D. Divergent Incentives

Divergent incentives are perhaps the most familiar source of bureaucratic oppression because they are part of public choice analysis, or, more generally, of the microeconomic methodology that views human behavior as an effort by individual actors to maximize their personal self-interest.<sup>33</sup> Public choice analysis argues that this

---

<sup>31</sup> Weber, *supra* note [ ], at 956

<sup>32</sup> *Id.* at 957

<sup>33</sup> See generally James Buchanan & Gordon Tullock, *The Calculus of Consent* (1962); Daniel Farber & Philip Frickey, *Law and Public Choice* (1991); Dennis Mueller, *Public Choice III* (2003); Jonathan Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 *Cornell L. Rev.* 43 (1988); Geoffrey Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Magarine*, 77 *Cal. L. Rev.* 83 (1989).

predilection will lead government officials to be concerned with achieving advantages for themselves, rather than fulfilling their obligation to serve the needs of the supposed beneficiaries. The oppression that is likely to result from such divergent incentives is apparent. What is not so obvious, however, is the nature of the interest that these officials are trying to maximize. Public choice theory has had considerable success in modeling legislators as re-election maximizers, but it has stumbled badly in its effort to identify the equivalent maximizing behavior for administrative agents. William Niskanen's idea that they are trying to maximize their agency's budget<sup>34</sup> has proven to be empirically untenable,<sup>35</sup> while subsequent claims that they are trying to maximize their "slack," or discretion,<sup>36</sup> are only rescued from similar empirical falsification by their pervasive ambiguity. A much more convincing hypothesis, but one that eludes public choice analysis, is that many government agents are not trying to maximize anything, but rather trying to minimize work or hassle.<sup>37</sup> That is certainly the impression conveyed by the clerk behind the metal counter.

The problem of divergent incentives, however, goes well beyond public choice analysis, or even the related hypothesis of

---

<sup>34</sup> William Niskanen, *Bureaucracy and Representative Government* (1971)

<sup>35</sup> See Herbert Kaufman, *The Administrative Behavior of Federal Bureau Chiefs* (1981); Wilson, *supra* note [ ], at 118, 235-53. A classic example of a federal agency that seemed to be striving to maximize its budget and expand its authority was the Federal Trade Commission of the late 1970s under the chairmanship of consumer advocate Michael Pertschuk. But closer analysis revealed that the agency was simply responding to Congressional directives. See Barry Weingast & Mark Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 *J. Pol. Econ.* 765 (1983). The subsequent ire of Congress against the FTC resulted from the fact that the dominant view in Congress had changed, not from the agency's independent action. See Michael Pertschuk, *Revolt Against Regulation: The Rise and Pause of the Consumer Movement* (1982).

<sup>36</sup> Jean-Luc Migue & Gerard Belanger, *Toward a General Theory of Managerial Discretion*, 17 *Pub. Choice* 27 (1974)

<sup>37</sup> It eludes public choice analysis because microeconomic analysis depends on maximizing behavior.

hassle minimizing, and links directly to the problem of institutional pathologies. As Charles Schultze and James Q. Wilson point out, government agents do not derive any direct benefit from providing effective or gracious service.<sup>38</sup> They work in institutions, and institutions exercise powerful effects over their members. The formal rules and informal norms of their agency, the dense web of written requirements, institutional practice, supervision and peer relations, are almost invariably the primary determinants of their behavior. One specific manifestation of such institutional effects that runs directly counter to humane, effective service is group solidarity. People's instinctive sociability leads government officials to establish congenial, and in some cases truly friendly relations with their colleagues; they interact throughout the day, have lunch together, perhaps even socialize after work. The citizens they serve, on the other hand, are strangers, as described above, and often unwelcome intrusions.

There are, undoubtedly, various other sources of bureaucratic oppression.<sup>39</sup> One explanation that should be discounted, however, is Theodore Lowi's claim that oppression results from an excessive grant of discretion to administrative agents.<sup>40</sup> Discretion is an almost uselessly vague term, but to the extent that it can be defined,<sup>41</sup> it

---

<sup>38</sup> Charles Schultze, *The Public Use of Private Interest* 66-83 (1977); Wilson, *supra* note [ ], at 113-36.

<sup>39</sup> Several commentators have observed that the excessively adversarial stance that U.S. agencies adopt toward those whom they regulate or serve is another institutional pathology that contributes to oppressive administrative behavior. See Derek Bok, *The Trouble With Government* 163-68 (2001); Robert Kagan, *Adversarial Legalism: The American Way of Law* (2001).

<sup>40</sup> Theodore Lowi, *The End of Liberalism: The Second Republic of the United States* 92-126 (2<sup>nd</sup> ed. 1979). See also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 259 (1994); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People through Delegation* (1993).

<sup>41</sup> In the section of his book entitled "Delegation Defined," for example, Lowi never offer a definition. See Lowi, *supra* note [ ], at 95-97. For what is probably the leading effort to define the term, see Ronald Dworkin, *Taking Rights Seriously* 31-32 (1978). Dworkin's approach is related to the legal process approach of Hart and

probably does not exist in the administrative state. Virtually all administrative agents have some set of goals, whether effective or ineffective, client-centered or institution-centered, that they are expected to achieve by their hierarchical superiors. Their actions, as noted above, are governed by a dense framework of institutional expectations and understandings.<sup>42</sup> To be sure, this framework may allow, or require that the agent make choices, but those choices are constrained by a variety of factors whose cumulative effect will be to eliminate the sense of freedom that the term discretion tends to imply.

Bureaucratic oppression, particularly as experienced by individuals,<sup>43</sup> is more likely to result from the government agent's scrupulous, perhaps mindless obedience to the applicable rules than from disobedience of those rules and the indulgence of caprice.

## II. What is to Be Done?<sup>44</sup>

Bureaucratic oppression is hardly an obscure phenomenon; not only is it apparent to any conscientious observer, but, unlike other problems such as malnourishment or inadequate health care, every person who chooses to consider the subject is likely to have experienced it personally. The causes of bureaucratic oppression, however, are so closely related to the inherent structure of modern government and modern society that the difficulty of finding a solution has been equally apparent. While this sometimes induces a

---

Sachs, see Vincent Wellman, Dworkin and the Legal Process Tradition: The Legacy of Hart and Sachs, 29 *Ariz. L. Rev.* 413 (1987).

<sup>42</sup> M.P. Baumgartner, *The Myth of Discretion*, in Keith Hawkins, ed., *The Uses of Discretion* (1992), at 129; Martha Feldman, *Social Limits to Discretion: An Organizational Perspective*, in *id.* at 163; Keith Hawkins, *On Legal Decision-Making*, 42 *Wash. & Lee L. Rev.* 1161 (1986); Edward Rubin, *Discretion and Its Discontents*, 72 *Chi.-Kent L. Rev.* 1299 (1997)

<sup>43</sup> Lowi's sympathies are expressed exclusively for businesses. Lowi, *supra* note [ ], at 108-113

<sup>44</sup> The reference to V.I. Lenin, *What is to Be Done?: Burning Questions of Our Moment* (1929) is only partially facetious. Trotsky thought that bureaucracy was responsible for the demise of genuine Communism, see Leon Trotsky, *The Revolution Betrayed: What Is The Soviet Union and Where Is It Going?* (Max Eastman, trans., 1937).

sense of fatalism, it has also elicited thoughtful proposals for fundamental change in governmental operations from a variety of academic disciplines. Legal scholars have proposed the imposition of due process standards on government agencies, organization theorists in sociology and public policy have proposed client-centered management, and economists have proposed reliance on market incentives. Moreover, these proposals are not merely academic; each has been implemented by political actors to significant extent. This section will consider them in turn.

#### A. Due Process: The Legal Solution

The rationale for using due process to combat bureaucratic oppression is a powerful one, and the way the concept was applied in practice was creative and sophisticated. Originally, due process involved a set of rules governing the conduct of a civil or criminal trial. The significance of these rules is that trials were essentially the only legal means by which the pre-modern state interacted with individuals. Of course, the state also affected people by enacting legislation, but legislation is generally directed against large groups, which can protect themselves through the political process. A group may lose out, of course; legislation may favor dairy farmers over vegetable oil producers, or optometrists over opticians,<sup>45</sup> but that is the nature of the political process. During the Progressive Era, a conservative Supreme Court thought it could use the due process clause to protect groups from legislation that disfavored them without good reason,<sup>46</sup> but the resulting doctrine, termed substantive due process, proved untenable, and was ultimately abandoned by the Court.<sup>47</sup> The rationale for legislation cannot be effectively policed by

---

<sup>45</sup> See *United States v. Carolene Prods.*, 304 U.S. 144 (1938); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955). For an account of the politics that accompany such legislation, see Geoffrey Miller, *The True Story of Carolene Products*, 1987 *Sup. Ct. Rev.* 397.

<sup>46</sup> For characteristic decisions, see *Lochner v. New York*, 198 U.S. 45 (1905); *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Tyson & Brother v. Banton*, 273 U.S. 418 (1927); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). See generally Roscoe Pound, *Liberty of Contract*, *Yale Law Journal* 18:454 (1909)

<sup>47</sup> See *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See generally Howard Gillman, *The Constitution*

courts; virtually all legislation favors some group over another, and our system of majoritarian decision making allows government to make these choices, subject only to the constraint of politics in most situations.<sup>48</sup>

Individuals, however, rarely have access to the political process, and thus cannot look to this means of protecting their interests. Conversely, there is no need to allow the government to choose among individual interests to preserve the process of majoritarian decision making. Thus, when the government acts against individuals, additional constraints can and should be imposed to protect the interests of individuals and ensure that the government is acting fairly. This result is achieved by two principles, codified in the U.S. Constitution as the bill of attainder clause and the due process clause.<sup>49</sup> The bill of attainder clause forbids Congress from passing legislation that imposes disadvantages on individuals.<sup>50</sup> Thus, government may only disadvantage individuals by applying general laws to them, laws which are the product of the political process

---

Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (1993); Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992).

<sup>48</sup> Constraints on majoritarian decision making are imposed to protect basic human rights, such as free speech, and to protect the integrity of the political process itself. This is the import of the famous footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152n.4 (1938). See Bruce Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985); Jack Balkin, *The Footnote*, 83 Nw. U. L. Rev. 275 (1989); Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Insider-Outsider,"* U. Penn. L. Rev. 1291 (1986); John Ely, *Democracy and Distrust* (1980). In recent years, the Court has also imposed constraints on federal legislation to protect the rights of states, see *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992), but there are strong arguments against this, see Jesse Choper, *Judicial Review and the National Political Process* (1980).

<sup>49</sup> U.S. Const., Art. I, Sec. 9; Amend. V; Amend. XIV

<sup>50</sup> It is acceptable, from the perspective of human rights or fundamental fairness, to pass legislation favor specific individuals, but the practice is frowned on from a public policy perspective. See Cass Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985); Cass Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984)

where they will have obtained whatever protection their group can provide.

The due process clause then imposes constraints of the way the government applies the law. The purpose of these constraints, in essence, is to ensure that the disadvantages being imposed on an individual are authorized by a general law, where group protection is available.

Since the only mechanism that available to the state for applying legislation to individuals in the pre-administrative era were the courts, due process protections developed as a set of rules involve court proceedings, whether criminal or civil. With the advent of the administrative state, however, agencies became the primary means for implementing legislation, and thus the primary means by which the state interacted with individuals. The problem was that there was initially no established means of applying the due process clause to these non-judicial situations; thus, the first instinct was to declare that the clause did not apply at all, that administratively-implemented benefits were privileges, not rights.<sup>51</sup> This position was originally a product of the substantive due process era, when the misplaced empathy for property owners that led the courts to police general legislation was matched by a corresponding lack of empathy for wage earners and poor persons who depended on benefits created by the legislature and enforced by agencies. Because the concept of due process was tied, conceptually, to judicial trials, however, the rights-privileges distinction persisted for thirty years after the demise of substantive due process.<sup>52</sup> This suggests that the difficulty in applying due process protection to administrative action was conceptual, not political.

The conceptual difficulty was finally solved by abstracting the elements of due process from their civil trial context, so that they could be applied in a broader range of settings, and specifically to the now-ubiquitous interactions between administrative agencies and individuals. The case that began this development is probably

---

<sup>51</sup> *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892) (Judge Oliver Wendell Holmes). See Charles Reich, *The New Property*, 73 *Yale L.J.* 733 (1964).

<sup>52</sup> See, e.g., *Fleming v. Nestor*, 363 U.S. 603 (1960); *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960); *Beilan v. Board of Education*, 357 U.S. 399 (1958); *Barsky v. Board of Regents*, 347 U.S. 442 (1954).

Mullane v. Central Hanover Trust Co.,<sup>53</sup> but the crucial decision is in the 1970 case of *Goldberg v. Kelly*.<sup>54</sup> *Goldberg's* abolition of the right-privilege distinction was stated in an almost off-hand manner.<sup>55</sup> The real work in the decision is the effort to identify the generalized elements of due process protection. According to the decision, these are notice of the matter at stake, an oral or written hearing where each side is able to state its case,<sup>56</sup> a neutral decision maker, and a decision based on the evidence and arguments presented.<sup>57</sup> Having characterized the essence of due process in this manner, the Court was able to apply it, in a series of subsequent cases, to a wide variety of administrative settings. In *Matthews v. Eldridge*, the Court held that only written submissions were necessary in social security hearings;<sup>58</sup> in *Vitek v. Jones*,<sup>59</sup> it fashioned a quasi-adversarial proceeding to determine whether prisoners could be transferred to a mental institution, and, most dramatically, in *Goss v. Lopez*,<sup>60</sup> it

---

<sup>53</sup> 339 U.S. 306 (1950). New York law provided that notice to beneficiaries of a common trust fund that the fund was being termination should be provided by newspaper publication. Justice Jackson argued that the due process clause required more specific notice in cases where the beneficiaries were known to the trustee. He did so by detaching the concept of notice from the indictment or complaint of traditional trials, and then applying this generalized concept to the specific situation in the case.

<sup>54</sup> 397 U.S. 254 (1970)

<sup>55</sup> *Id.* at 262

<sup>56</sup> *Id.* at 267-71 The only matter that was truly at issue was whether a written hearing would be sufficient. The Court required an oral hearing in the specific context of welfare termination, but implied that written hearings could be acceptable in other situations.

<sup>57</sup> *Id.* at 271

<sup>58</sup> 424 U.S. 319 (1976)

<sup>59</sup> 445 U.S. 480 (1980). See also *Hewitt v. Helms*, 459 U.S. 460 (1983) (establishing a quasi-adversarial hearing for placement of a prisoner in administrative segregation).

<sup>60</sup> 419 U.S. 565 (1975)

reduced the requirements to a minimum in order to apply them to week-long suspensions from public school.

The Supreme Court's impressive conceptual success in generalizing due process protection for individuals so that it could be applied to administrative interactions was ramified by scholarly discussion. The idea that trials in the pre-modern world, and administrative due process in the contemporary one, protects individuals by requiring government to demonstrate that they belong within a category created by majoritarian legislation focuses on the role of due process in ensuring the accuracy of the state's determination. Jerry Mashaw and Frank Michelman pointed out that due process also serves a dignitary or fraternal function by giving individuals a voice and requiring the government to respond seriously to their challenges or allegations.<sup>61</sup> Tom Tyler then discovered, through empirical investigation, that government's compliance with due process requirements lends moral authority to its determinations, and reconciles people to adverse decisions.<sup>62</sup> He further found that the underlying reason for this effect is not only the perceived fairness of the due process-bound determination, but also the dignitary or fraternal effects the Mashaw and Michelson discerned. Through their scholarship, these writers, and others, advanced the incisive point that administrative due process, in applying an abstracted, generalized version of the trial model, must incorporate the symbolic and dramaturgical features of trials along with their fairness in determining the facts.

Despite its grounding in our basic theory of government, and the sophistication with which it has been developed by both judges and scholars, generalized due process is seriously limited as a means of controlling bureaucratic oppression. To begin with, it is limited to interactions between individuals and government that fall into the category of adjudications, that is, a final determination about whether to impose some disadvantage, or deny some advantage, to an

---

<sup>61</sup> Jerry Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 *B.U. L. Rev.* 885 (1981); Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, Frank Michelman, *Formal and Associational Aims in Procedural Due Process*, 18 *Nomos (Due Process)* 126 (1977)

<sup>62</sup> Tom Tyler, *Why People Obey the Law* (1990)

individual. But most of the interactions that give rise to bureaucratic oppression lie well outside this category. Gogol's Very Important Person is not making a determination at all, but only demanding, however harshly, that Akaky follow established procedures; similarly, the crabby official behind the metal counter is simply informing the hapless applicants that they have chosen the wrong line. Much oppression resides in the informal, quotidian contacts between individuals and government officials. Both due process decisions and due process scholarship emerge from the discipline of law, and suffer from that discipline's disproportionate emphasis on adjudicatory action. The field simply fails to provide an adequate conceptual framework for addressing non-adjudicatory interactions.

Even within the ambit of adjudication where legal analysis prevails, due process requirements do not necessarily provide a solution to the problem of bureaucratic oppression. The pursuit of an adjudicatory remedy requires a certain rights-orientation, an optimistic confidence in one's own position and abilities, that is often precisely what is lacking in recipients of government assistance. To say that people who are capable of obtaining benefits by pursuing an adjudication are probably those who do not require benefits in the first place would be going to far. But clearly, many people who receive benefits or services from government – the disabled, the sick, the elderly, the young, the very young, the mentally deficient and deranged – are precisely those whose vulnerabilities preclude assertion of their rights. Like consumers generally, they are more likely to “lump it” than to enter the foreign, and seemingly perilous territory of legal action. Lawyers or other professional representatives can supply the required sense of confidence and outrage, but they are formidably expensive, and often just as foreign and frightening as the legal system, to which they unmistakably belong. Legal services lawyers are an exception on both counts, but they are in increasingly short supply, perhaps, if one wants to be cynical, for that very reason.

There is, moreover, some question whether due process requirements really serve to decrease bureaucratic oppression, even when the aggrieved individual can obtain legal representation, or when the adjudication is so informal that most people can assert their claims on their own, as in the case of school suspension hearings.<sup>63</sup>

---

<sup>63</sup> As established by *Goss v. Lopez*, 419 U.S. 565 (1975). This situation is quite rare, however. The Court claimed that it applied to adjudications involving

The image of a hearing that ensures an accurate application of the law's general categories to individuals, or, better still, that conveys a sense of fairness and respect, is an appealing one, and not without factual foundation. There is, however, the countervailing image conjured up by Malcolm Feeley's study of the New Haven criminal courts, which is tellingly entitled *The Process is the Punishment*.<sup>64</sup> Legal procedures can be an instrument of oppression, rather than an antidote to such oppression; they can immerse the average person in a foreign world where strange, barely-comprehended rituals that lead to potentially disastrous results. While law-trained people see logic, dignity, and protection from government oppression in judicial and judicially-based procedures, others may see an Alice in Wonderland farrago, where strange creatures speak gibberish, and the presiding official shouts "Give your evidence . . . and don't be nervous, or I'll have you executed on the spot."<sup>65</sup> Most significantly, they may not see protection from government authority but an exercise of that authority, a situation that Carroll portrayed by having the King, who presides at Alice's trial, wear his crown on top of his wig.<sup>66</sup> The informality of bureaucratic process may make the situation worse, not better. A feature of Kafka's law courts that makes them seem particularly sinister is that they are placed on the top floor of tenements, insinuating themselves into people's lives without the liminal warning that ceremony and formality provides.<sup>67</sup>

---

veterans' benefits in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), but the opinion is entirely unconvincing.

<sup>64</sup> Feeley, *supra* note [ ].

<sup>65</sup> Lewis Carroll, *Alice's Adventures in Wonderland & Through the Looking Glass* 147 (Martin Gardner, ed., 1960)

<sup>66</sup> *Id.* 144. Carroll thought this a sufficiently significant image to make it the frontispiece of his book, a decision which he refers to in the text, see *id.*; *id.* at 16.

<sup>67</sup> Franz Kafka, *The Trial* 43-49 (Willa & Edwin Muir, trans., 1937). To be sure, the primary meaning of Kafka's law courts is almost certainly religious, but they are also a satire on middle European bureaucracy, and it is the simultaneously metaphysical and mundane character of his imagery that makes the novel so effective.

## B. Client-Centered Governance: The Management Solution

Management theory, as developed through the disciplines of sociology and public policy analysis offers an entirely different solution to the problem of bureaucratic oppression. Instead of imposing externally-generated requirements on government agents, the management approach attempts to change these agents' internal attitudes. In particular, the aspiration is to instill an ethos of client orientation, a prevailing attitude that the people for whom the agency provides benefits or services are to be treated as clients, or better still, as customers. According to the Gore Report, an action plan drafted at the beginning of the first Clinton administration that summarized the work of a study group called the National Performance Review, "government agencies must do what many of America's best businesses have done: renew their focus on customers."<sup>68</sup> The report, moreover, documents a number of cases where agencies actually implemented this approach.<sup>69</sup>

Michael Barzelay provides a more systematic account of client-centered administration.<sup>70</sup> The first step, he suggests, is to identify the customer with care: "A customer relationship is a mutually adjustive working relationship in which the provider's main purpose is to meet the user's needs."<sup>71</sup> One danger to be avoided is expanding the idea of a customer beyond the boundaries of this relationship: "The potential consequences of identifying as customers the people obligated to comply with norms include misstating the principal purposes of compliance organizations and dissipating the conceptual force of the term customer."<sup>72</sup> After the customer has

---

<sup>68</sup> National Performance Review, *supra* note [ ], at 44; see generally *id.* at 43-64 (section entitled "Putting Customers First.")

<sup>69</sup> *Id.* at 45-47 (describing programs run by the IRS, the Social Security Administration and the Postal Service)

<sup>70</sup> Michael Barzelay, *Breaking Through Bureaucracy: A New Vision for Managing in Government* 102-114 (1992)

<sup>71</sup> *Id.* at 110.

<sup>72</sup> *Id.* at 107

been identified, the agency must decide the particular kind of service that it should be providing. The best source of information about this is the customers themselves. While the customers' perceptions are not necessarily accurate, they should be accepted unless a persuasive argument can be made for contradicting or ignoring them. Thus, customer evaluations can be used to assess and readjust agency procedures. To foster an ethos of customer service, control functions should be separated from service functions, and assigned to a different unit of the agency.

A particularly thoughtful and creative assimilation of this management theory into legal scholarship is described by its proponents as New Public Governance. One of its primary themes is that command and control regulation is ineffective, and should be replaced by a more collaborative approach.<sup>73</sup> When applied to government provision of goods and services, this approach suggests that those receiving benefits or services from government should be consulted about both the design and implementation of the program. In fact, the approach is sufficiently general that it can be applied to an extremely wide range of government interactions with individuals, including the treatment of drug offenders. Describing the use of drug courts to replace the standard criminal sanction, Michael Dorf and Charles Sabel write: "The central feature of this governance system is that the monitored agents choose their own precise goals and the means for achieving them in return for furnishing a central authority with the information that allows evaluation of their performance. . . . [B]y collaborating in this way, central authority and decentralized actors can together explore and evaluate solutions to complex problems that neither alone would have been likely to identify, much less investigate or address, without the exchanges with the others. The

---

<sup>73</sup> See, e.g., Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Eugene Bardach & Robert Kagan, *Going By the Book: The Problem of Regulatory Unreasonableness* (1982); John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. Rev.* 1 (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *Minn. L. Rev.* 342 (2004); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458 (2001)

same exchanges of information, moreover, enable the institutions continually to adjust their means and ends in the light of experience.”<sup>74</sup>

Despite the broad support that it engenders, and the intellectual sophistication of its proponents, client-centered management suffers from serious limitations as a response to the problem of bureaucratic oppression. Like policy analysis in general, its implicit audience is a rational policy maker who exists only in theory; when attention focuses on real-world actors, the recommended policy takes on the character of a moral exhortation. Neither is without its value, to be sure. It is useful to know the optimal strategy to achieve a given result, that is, the strategy that a perfectly rational decision maker, unencumbered by political constraints, would find persuasive. Similarly, exhortations from scholars often prove to me more influential than might be expected, particularly over long periods of time. But the problem of bureaucratic oppression is one that is specifically resistant to either optimal strategies or moral exhortations. No one is in favor of bureaucratic oppression, and while some administrators may adopt it as a conscious approach to deter citizen users and save money, few could be said to do so justifiably. As described above, the real causes of bureaucratic oppression are deeply-embedded structural factors: status differences, stranger relations, institutional pathologies, and divergent incentives. Thus, the task is to counteract these structural factors, to reduce or eliminate the impediments that prevent conscientious policy makers from providing the kind of service that they know is preferable. Telling them that a client-centered strategy is the optimal approach, and exhorting them to adopt that strategy, simply fails to address the real problem.

To explain the mechanism by which his client-centered approach would be implemented, Barzelay writes: “In a typical customer relationship, users believe that providers should be accountable to them (and perhaps to other parties) for [meeting the users’ needs] and providers recognize that they ought to be so accountable.”<sup>75</sup> This makes a good deal of sense, but the term

---

<sup>74</sup> Michael Dorf and Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 *Vand. L. Rev.* 831 (2000).

<sup>75</sup> Barzelay, *supra* note [ ], at 110. This sentence appears in a section with the hortatory title: “Be Accountable to Customers.” *Id.* at 109.

“accountable” is undefined, and, in fact, it conceals a crucial ambiguity.<sup>76</sup> It implies that one person is answerable to another, and must conform his or her behavior to the other’s desires. But the primary means by which this is achieved, in a modern context, is through administrative supervision. We often speak of election as providing accountability, but the connection between being elected by a group of people and being subject to ongoing, detailed supervision is rather large, so that the term accountability, as used in this context, seems to be more metaphorical than operational.<sup>77</sup> The main point is that the users, or “customers” of a government agency are not in a position to supervise that agency’s officials in any sense, not even the attenuated sense in which voters supervise elected officials, and clearly not in the robust sense in which an administrative superior supervises a subordinate. That is precisely where the problem of bureaucratic oppression resides. In theory, and on the basis of moral exhortation, these officials should of course be accountable to the people whom the legislature has instructed them to serve. But because of status differences, stranger relations, institutional pathologies and divergent incentives, they are simply not accountable in any real sense.

Studies of customer relations in business firms suggest a further difficulty with client-centered governance. These studies, engendered by the shift from a manufacturing to a service and information economy<sup>78</sup> have observed that management efforts to induce employees to be pleasant, helpful and generally customer-oriented often produce routinized, stereotyped behaviors that generate

---

<sup>76</sup> Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, \_\_\_ Mich. L. Rev. \_\_\_\_ (forthcoming, 2005)

<sup>77</sup> Id. at \_\_\_\_

<sup>78</sup> See Ash Amin, ed., *Post-Fordism* ((1994); Daniel Bell, *The Coming of Post-Industrial Society* (1974); Manuel Castells, *The Information Age: Economy, Society and Culture*, vol. 1: *The Rise of Network Society* 151-324 (1996); Michael Piore & Charles Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (1984). In fact, several observers argue that the sociology of work remains tied to the older model of industrial production, and has failed to take full account of this transition. See Macdonald & Sirianni, *supra* note [ ]; Holly McCammon & Larry Griffin, *Workers and Their Customers and Clients*, 27 *Work & Occupations* 278 (2000).

resentment among employees and provide customers with little more than empty gestures.<sup>79</sup> If this is true in private enterprise, where the employees are providing services to customers and the crucial choices generally lie within the customer's control, it is probably much more true in government, where the employees are often exercising authority, and the citizen has few, if any options. Thus, the only effect of an agency's efforts to make its employees more customer-oriented may be that the now-resentful employees say "Great to see you. Have a nice day." after having provided the same peremptory treatment.

New Public Governance provides a partial response to these difficulties by emphasizing the importance of collaboration with the customers regarding the agency's implementation strategy, and perhaps even its norm or policy formation. This establishes a dynamic relationship that allows the customers to interact with the agency on a continuous basis, and thereby become a structural component of the agency's behavior pattern that can counteract the structural features discussed above. For example, if a social service agency regularly consults with advocacy groups and focus groups of individual recipients in designing and revising its mode of distributing benefits, these groups will be part of the agency's decision making apparatus. They will thus produce an effect on the agency without having to rely on the agency's self-imposed commitment to be client-oriented. In addition, it avoids relying on externally-imposed rules that are derived from a judicial model, and are thus of limited relevance to the day-to-day realities of the administrative setting.

While New Public Governance thus represents an important conceptual advance that incorporates insights from management theory and the sociology of institutions into legal analysis, its recommendations have significant limitations of their own. To government officials at the operational level, the demand that they engage in a collaborative relationship with the beneficiaries of their program is as external a demand as the imposition of due process requirements. This is not necessarily fatal, since institutional change

---

<sup>79</sup> Karl Albrecht & Ron Zemke, *Service America! Doing Business in the New Economy* (1985); Gutek, *supra* note [ ]; Arlie Hochschild, *The Managed Heart: Commercialization of Human Feeling* (1983); Robin Leidner, *Fast Food, Fast Talk: Service Work and the Routinization of Everyday Life* (1993)

must begin from somewhere. The problem is that the mechanism for continued implementation of the collaborative approach is attenuated. It is true that the clients have been incorporated into the decision making structure. The difficulty is that all the inherent structural features that generate bureaucratic oppression – status differences, stranger relations, institutional pathologies and divergent incentives – will continue to operate. The clients will continue to be seen as low status individuals; the obligation to consult with them will strike most officials as a burden and an intrusion; the inclination to follow procedures, and use those procedures as a means of avoiding difficult or trying situations will continue; and the officials will still have the same divergent incentives as before. New Public Governance represents a real advance, but it depends on a rather sunny view of public officials, an expectation that they will be more conscientious, more flexible, and more willing to collaborate with clients than is actually the case.

### C. Market Mechanisms: The Microeconomic Solution

A third way of combating bureaucratic oppression involves the use of market mechanisms. Based on microeconomic analysis, this approach is directly addressed to the divergent incentives of administrative agents, but offers an overall solution through the assertion, characteristic of this field, that individual incentives are the decisive factor in determining human and institutional action. Market mechanisms are thus designed to avoid the defects in the previously described solutions; they are not externally-imposed rules, and they do not depend on the good will or conscientiousness of the administrators. Rather, the idea is to create a situation where people's personal self-interest, the source of all human action in microeconomic analysis, will lead to the elimination of bureaucratic oppression. In his study of bureaucracy, James Q. Wilson contrasts the mild but ubiquitous oppression of the long lines and the bored official behind the metal counter with the cheerful politeness and efficiency of the nearby McDonalds,<sup>80</sup> a cheerfulness that has become virtually emblematic of the new service society.<sup>81</sup> His explanation

---

<sup>80</sup> Wilson, *supra* note [ ], at 113. The government office he describes is the Registry of Motor Vehicles.

<sup>81</sup> See Ritzer, *supra* note [ ].

for the difference is that McDonalds is operating in the market, where self-interest and good service are aligned.<sup>82</sup>

The idea of market mechanisms actually consists of two different approaches to the problem of bureaucratic oppression. The first approach involves the literal use of these mechanisms, that is, relying on market mechanisms by diminishing the scope of regulation, benefits and services that the government provides. The second is an effort to incorporate market mechanisms into the operation of administrative government by changing the way that administrative agencies are structured. These are independent solutions; they can be readily combined, and often are, since they are based on the same theory of human action, but they can also be implemented separately without impairing their effectiveness in any way.

Diminishing the scope of administrative regulation, benefits and services is a popular idea these days,<sup>83</sup> and has been implemented in a variety of settings. Most of the true deregulation occurred during the Carter administration.<sup>84</sup> Benefit and service reduction has been implemented during subsequent years, particularly in the social welfare area,<sup>85</sup> although it is sometimes difficult to distinguish between ideologically-based reductions and reductions driven by budgetary shortages. The consequence, in all these cases, is that an area previously addressed through a government program is now being controlled by the market; airline prices are now set by market competition, not the Civil Aeronautics Bureau, individuals who

---

<sup>82</sup> Id. at 115-36. Wilson notes that government agencies, unlike a private firm, "(1) cannot lawfully retain and devote to the private benefit of their members the earnings of the organization (2) cannot allocate the factors of production in accordance with the preferences of the organization's administrators, and (3) must serve goals not of the organization's choosing." Id. at 115.

<sup>83</sup> See James Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (1975); Robert Nozick, *Anarchy, State and Utopia* (1974)

<sup>84</sup> Martha Derthick & Paul Quirk, *The Politics of Deregulation* (1985); Thomas McCraw, *Prophets of Regulation* 222-99 (1985)

<sup>85</sup> Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, 110 Stat. 205 (1996), codified at 42 U.S.C. §§ 601-17 (2002) (replacing the Aid to Families with Dependent Children (AFDC) program).

welfare benefits are terminated must now depend on their the market value of their labor, or their parents' labor, for their sustenance.<sup>86</sup>

Whatever the general virtues and vices of this approach, it suffers from some serious defects as a solution to the problem of bureaucratic oppression. To begin with, it is fragmentary; despite the fervent dreams of the far right, there is no realistic possibility that the administrative state will be dismantled. The demands for personal security, economic security and social justice by citizens of modern states are simply too insistent, and any government that chose to ignore these demands would risk rapid dissolution. It is true that voting majorities in the United States have been willing to scale back administrative programs providing for economic security, probably because racial division decrease their sympathy for the poor, but how willing would these same majorities be, particularly after the World Trade Center attack, to scale back administrative programs providing for personal security?

A second problem with replacing administration with the market is that it does not necessarily reduce the amount of oppression that individuals experience. As John Kenneth Galbraith observes, the large firms that dominate the market in many areas are themselves bureaucracies.<sup>87</sup> Wilson responds that they are different kinds of bureaucracies because private firms are subject to market discipline, that is, their well-being depends directly on the caliber of goods and services that they provide.<sup>88</sup> The difficulty, however, is that the bureaucratic nature of the firm may insulate the individuals within the firm from the feedback mechanisms of the market.<sup>89</sup> Like government officials, their behavior to their customers may be governed by status differences, stranger relations, institutional pathologies and divergent incentives. Agency problems of this sort are common in large firms;

---

<sup>86</sup> See Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (1994) (political intervention and the market are alternative modes of social organization)

<sup>87</sup> John Kenneth Galbraith, *The New Industrial State* (1967). See also Oliver Williamson, *The Mechanisms of Governance* 219-49 (1996)

<sup>88</sup> Wilson, *supra* note [ ], at 134-36.

<sup>89</sup> See Oliver Williamson, *Markets and Hierarchies* (1985)

McDonalds employees may be polite to customers who come in to order a hamburger, but the now-deregulated airline employees may not be as helpful to the long lines of irate customers on the other side of their metal counters, despite some vaguely-understood connection between customer satisfaction and the ultimate economic health of their employer.<sup>90</sup> Moreover, even if employees of private firms are more polite than government agents in their manner of treating individual customers, the firm itself may subject these customers to other types of oppression. The polite McDonalds employees are, after all, dispensing McDonalds food, which may well be lowering its customers' long-term life expectancy. Moreover, if McDonalds were not regulated by public health authorities, its food might lower some customers' short-term life expectancy. Private firms oppress individuals by polluting their environment, selling merchandise with hidden defects, and siphoning large sums off to their executives, legally and illegally. These firms have no incentive to concern themselves with any of these problems unless they become public in a way that affects their bottom line. Just as the World Trade Center crisis indicates our need for administrative government, the Enron crisis indicates the dangers to which private, relatively unregulated firms subject us.

A second, and distinctly different use of market mechanisms is to alter the incentive structure of administrative agencies, rather than replacing these agencies with market actors. One means of doing so is to set up a situation in which government institutions or programs compete with each other, like private firms, to obtain a source of income. In school voucher programs, for example, parents can choose among a variety of public schools, and the school then receives a fixed amount of public money for each student who enrolls.<sup>91</sup> Another approach, where such competition is impractical, is

---

<sup>90</sup> Wilson is somewhat scornful of Galbraith's work. He writes: "Professor Galbraith's book appeared at a time (1967) when American businesses were enjoying such unrivaled success that its beautifully crafted sentences seemed to capture some enduring truth. But the passage of time converted many of those eloquent phrases into hollow ones." *Id.* at 134. It would seem, however, that by the time Wilson's book appeared (1989), he should have been aware of the agency problems in large firms that modern microeconomics had explored.

<sup>91</sup> See Clint Bolick, ed., *Voucher Wars: Waging the Legal Battle over School Choice* (2003); John Coons & Stephen Sugarman, *Family Choice in Education: A*

to place a single agency on a receipt and expenditure basis, so that its budget depends on the service it provides. This is only possible for certain agencies, namely those that can be supported by user fees, such as highways, mass transit services or recreational facilities; it is obviously impossible for agencies that distribute benefits such as welfare or housing. An alternative is to simulate a receipt and expenditure situation by counting certain agency achievements as an economic input, or by counting the costs that the agency imposes as an expense. Robert Litan and William Nordhaus recommend the creation of a regulatory budget, where each agency would be allocated a fixed amount of costs that it could impose on private industry.<sup>92</sup> The Gore Report recommends the creation of one-stop worker training and retraining centers that would compete with one another for funding based on the number of people who used each center, and the results that they achieved.<sup>93</sup>

But creating either real or simulated market mechanisms for public agencies has serious limitations as a means of reducing bureaucratic oppression. The establishment of real market mechanisms constitutes a policy decision that may have serious detriments; it can distort private behavior, impose economically regressive costs, and induce the legislature to cut public funding.<sup>94</sup>

---

Model State System for Vouchers,(1971); James Dwyer, *Vouchers Within Reason: A Child-Centered Approach to Education Reform* (2002); Jerome Hanus & Peter W. Cookson, *Choosing Schools: Vouchers and American Education* (1996); Richard Kahlenberg, ed., *Public School Choice vs. Private School Vouchers* (2003); David Kirkpatrick, *Choice in Schooling: A Case for Tuition Vouchers* (1990); Terry Moe, *Schools, Vouchers, and the American Public* (2001); John Witte, *The Market Approach to Education: An Analysis of America's First Voucher Program* (2000). The seminal work in this movement is Coons and Sugarman, *supra*; the seminal implementation was in the Alum Rock, California school district, see Daniel Weiler, *A Public School Voucher Demonstration: The First Year at Alum Rock* (1974).

<sup>92</sup> Robert Litan & William Nordhaus, *Reforming Federal Regulation* (1983)

<sup>93</sup> National Performance Review, *supra* note [ ], at 49-50.

<sup>94</sup> See Ernest House, *Schools for Sale: Why Free Market Policies Won't Improve America's Schools, and What Will* (1998); Richard Musgrave & Peggy Musgrave, *Public Finance in Theory and Practice* (1973) (user fees and other special taxes are less efficient than raising funds through general income taxes because they have a distorting effect on behavior)

Bureaucratic oppression, however serious, may not rise to a level that justifies such a profound reorganization of essential public services. School vouchers are championed for the more basic reason that they will improve the intrinsic quality of education, not because the teachers will treat the students more respectfully, and user fees for national parks are championed on grounds of social justice, not because they will make the park rangers more polite. Even if the problem of bureaucratic oppression is seen to justify profound changes in public financing, the solution is not necessarily directed at the problem. Many other factors, including ability to pay, contribute to people's willingness to incur user fees. Imposing user fees on recreational facilities may convince poor people to stay home with their children and watch television, no matter how gracious the park official have become.

Simulated market mechanisms suffer from the same difficulty in targeting the specific problem of bureaucratic oppression. In addition, their use of artificially-determined valuations, or funny money, makes these programs complicated to administer, and potentially inaccurate. Real markets provide an enormous amount of information, largely for free;<sup>95</sup> collecting an equivalent amount of information, so that the simulated mechanism is sufficiently accurate to serve its purpose, may lie beyond the capacities of government. Ultimately, simulated market mechanisms may not be much of an improvement on the Office of Management and Budget's cost-benefit analysis,<sup>96</sup> which is a good deal simpler, and has nonetheless been subject to extensive criticism.<sup>97</sup>

---

<sup>95</sup> See Schultze, *supra* note [ ], at 19-20. For example, assessing the value of a bank's loans to third-world countries used to be a formidable, time consuming enterprise, requiring extensive knowledge about the particular country, its fiscal structure, and general economic trends. With the creation of a secondary market in third world debt, the necessary information is now listed in the newspaper.

<sup>96</sup> Exec. Order No. 13, 258, 67 Fed. Reg. 9, 385 (Feb. 26, 2002) (George W. Bush). See James Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 *Duke L.J.* 851 (2001); Harold Bruff, *Presidential Management of Agency Rulemaking*, 57 *Geo. Wash. L. Rev.* 533 (1989).

<sup>97</sup> See, e.g., E. Donald Elliott, *TQM-ing OMB: Why Regulatory Review Under Executive Order 12, 291 Works Poorly and What President Clinton Should Do About It*, 57 *Law & Contemp. Probs.* 167 (1994); Alan Morrision, *OMB*

### III. Dangerous Clients: The Phenomenological Solution

Bureaucratic oppression remains a ubiquitous problem and, given its structural origins, an intractable one. The solutions discussed above – due process, client-centered management and market mechanisms – are all useful efforts to combat the problem, but each has its limitations. This section offers a somewhat different solution based on the ombudsperson concept that has been implemented in a few places in the United States, and more extensively in Britain, Canada India, and the European Union. It too has limitations, but it is directed to the structural issues that generate bureaucratic oppression, and avoids some of the difficulties of other solutions. Although it draws on the same disciplines as these solutions, namely law, public policy, sociology and economics, it is primarily based on phenomenology, and specifically on the application of phenomenology to the sociology of individuals and institutions.

#### A. The Phenomenology of Danger

The collapse of the Roman Empire during the late fifth century, or, more specifically, the collapse of the Empire's ability to impose civil order,<sup>98</sup> led to a highly decentralized mode of governance in Western Europe. For about one thousand years, warrior aristocrats ruled territories of variable size, with a variable, but always considerable amount of independence. While they were organized in a clearly defined hierarchy, with the king or emperor at the top, and knights or castellans who controlled small territories at the bottom, each of them was considered a noble, or free man, as opposed to the serfs who farmed his lands. Each, whether he had several levels of subordinate nobles below him or several levels of overlords above him, was entitled to defend his rights, and assert

---

Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 Harv. L. Rev. 1059 (1986); Richard Pildes & Cass Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1 (1995).

<sup>98</sup> Whether the Roman Empire actually collapsed at this time is a matter of controversy among historians. See Henri Pirenne, *Mohammed and Charlemagne* (1939)

purported rights against his fellow nobles.<sup>99</sup> Because the kings and emperor were not capable of imposing civil order, this defense and assertion of one's rights was often accomplished by violence.<sup>100</sup>

The Western world's concept of manners, and specifically the respectful treatment of another human being, originated in these circumstances.<sup>101</sup> It is striking how gracious, how genuinely considerate, one will behave toward another person when that person can justifiably kill you for acting disrespectfully. This is not merely a question of fear, although fear obviously plays a role. Fear, or resentment, is likely to be the dominant reaction to a highwayman or pirate – also quite common in the medieval era due to the lack of civil order – who is holding a knife to one's throat. But a fellow nobleman is not simply someone who can kill you, but someone who can kill you justifiably. Thus, his dangerousness is not a violation of the social order, but an assertion of it, and it is this combination that confers status and engenders genuine respect. The connection between dangerousness and status is not based on a microeconomic explanation of human behavior, but on phenomenology. Microeconomics, which treats people as self-interest maximizers, can certainly explain why people would respond to threats of violence with a wariness that might resemble respect, but it has difficulty distinguishing between justified or unjustified threats, and cannot explain why such wariness would be transformed into genuinely respectful feelings. According to phenomenology, however, people are primarily motivated by the desire to create meaning for themselves. Each person stands at the center of a set of subjectively perceived experiences, and has no access to knowledge that lies

---

<sup>99</sup> See generally Marc Bloch, *Feudal Society* (L.A. Manyon, trans.) (1961); R. Van Caenegem, *Government, Law and Society in J.H. Burns, ed., The Cambridge History of Medieval Political Thought c.350 - c.1450*, at 174 (1988); Georges Duby, *The Chivalrous Society* (Cynthia Postan, trans.) (1977); Heinrich Fichtenau, *Living in the Tenth Century: Mentalities and the Social Order* (Patrick Geary, trans.) (1991); F.L. Ganshof, *Feudalism* (Philip Grierson, trans.) (1996); David Herlihy, *The History of Feudalism* (1970).

<sup>100</sup> Norbert Elias, *The Civilizing Process* (Edmund Jephcott, trans., 1994): vol. 2: *State Formation and Civilization*, at 263, 448-51

<sup>101</sup> *Id.*, vol. 1: *The History of Manners*, at 1

outside that ambit of experience.<sup>102</sup> Knowledge that lies beyond the individual's experience, including social knowledge, must be transmitted to the person through an intersubjective process.<sup>103</sup> In fact, such knowledge is necessary for all but the most primeval thoughts, and the world that each individual perceives, though a matter of personal experience, is an interpreted world, interpreted by the intersubjective knowledge that constitutes society and culture.<sup>104</sup> The individual must then integrate this knowledge with personal experiences and emotions to create a meaningful totality.<sup>105</sup>

Thus, the fear engendered by a dangerous person is combined with the intersubjective interpretation of that person as justified in eliciting that fear. This combination of emotion and knowledge is then given meaning by according the individual respect, or social status. The sense of respect is generated by each individual's need to

---

<sup>102</sup> Edmund Husserl, *Cartesian Meditations* 65-69 (Dorion Cairns, trans.) (1993); *The Crisis of the European Sciences and Transcendental Phenomenology* 103-11 (David Carr, trans.) (1970) [hereinafter cited as *Crisis*]; Edmund Husserl, *Ideas: General Introduction to Pure Phenomenology* 45-50, 91-96 (W.R. Boyce Gibson, trans.) (1962) [hereinafter cited as *Ideas*]; M. Merleau-Ponty, *Phenomenology of Perception* 3-12, 203-42 (Colin Smith, trans.) (1962). For a more extensive discussion, see Edward Rubin, *Putting Rational Actors in Their Place: Economics and Phenomenology*, 51 *Vand. L. Rev.* 1705 (1998)

<sup>103</sup> Husserl, *Crisis*, supra note [ ], at 161-67, 244-57; Husserl, *Ideas*, supra note [ ], at 94; Alfred Schutz, *The Phenomenology of the Social World* 97-138 (George Walsh & Frederick Lehnert, trans.) (1967). As Husserl states: "*in living with one another* each one can take part in the life of the others. Thus in general the world exists not only for isolated men but for the community of men; and this is due to the fact that even what is straightforwardly perceptual is communalized. *Crisis*, supra note [ ], at 163 (emphasis in original).

<sup>104</sup> Edmund Husserl, *Formal and Transcendental Logic* (Dorion Cairns, trans) (1969); Husserl, *Ideas*, supra note [ ], at 235-59; Schutz, supra note [ ], at 45-96.

<sup>105</sup> Schutz's work represents one way of translating Husserl's insights into social science. Another approach, which focuses more on social practices than individualized meaning, is ethnomethodology. See, e.g., Harold Garfinkel, *Studies in Ethnomethodology* (1984); George Psathas, ed., *Everyday Language: Studies in Ethnomethodology* (1979); (Roy Turner, ed., *Ethnomethodology* (1974). Schutz's interpretation seems preferable and is relied on here, not only because Husserl read and approved Schutz's work, see Maurice Natanson, *Edmund Husserl: Philosopher of Infinite Tasks* 106 (1973), but also because it is more philosophically sophisticated.

construct a meaningful account of his or her experience. “Why am I fearful of this person, and why does society protect that person’s ability to elicit that fear, rather than trying to protect me from the threat?” The attitudes thus generated are then communicated intersubjectively. Thus, reactions generated by the individual’s need to create meaning are then promulgated as social norms, and function as effective norms because they accord with their recipients’ internal needs. This recursive process, which is phenomenology’s solution to the macro-micro problem in modern sociology, explains how the inherent violence of medieval society, and the justification of that violence that followed from the lack of civil order, were transformed into components of a functioning social system.

In contrast to medieval society, the modern administrative state is characterized by high levels of civil order. The monopolization of force by the central government that occurred between the Middle Ages and the present time has suppressed interpersonal violence, and led to a pacified, orderly and complex social system.<sup>106</sup> But the increasingly complex and interdependent character of modern society<sup>107</sup> generates a different, if less dramatic set of dangers. Most people are dependent upon others for their livelihoods, and thus experience a sense of danger in dealing with those who are in a position to dismiss them, penalize them or stigmatize them. These sanctions, moreover, are generally justified by society’s property rules, either alone or in conjunction with the institutional rules of private firms, just as violence in response to insult was justified in medieval society. As a result, the medieval attitudes that accorded respect to military aristocrats have gradually evolved into modern attitudes that accord respect to those who can justifiably impose career-based sanctions. As before, this respect is not simply an outward display based on a subjectively-experienced sense of fear, but a genuinely-felt response based on the phenomenological need to create meaning, and the intersubjective promulgation of that response throughout society.

It is a sociological commonplace to observe that respect is based on social status. Stated in this manner, however, the

---

<sup>106</sup> Elias, *supra* note [ ], vol 2.

<sup>107</sup> Anthony Giddens, *Modernity and Self-Identity* (1991); Anthony Giddens, *The Consequences of Modernity* (1990).

observation is not particularly informative, since the two terms are often synonymous. A more useful inquiry is to determine the sources of respect and social status, then to see whether there is any difference between the two, and whether any of those sources are variables that are amenable to public policy intervention. The point of the foregoing discussion is to identify justifiable threat, or danger as a source of respect that is not equivalent to social status. Fame confers high social status, and thus generates respect, for non-dangerous persons; one can admire professional athletes or movie stars without being afraid of them. Conversely, justified danger can generate respect for persons who lack the other attributes of social status. Thus, a possible antidote for bureaucratic oppression is to engender respect for the low status persons who receive benefits and services from government agencies is to make them justifiably dangerous to the officials in the agency.

Norbert Elias' *The Civilizing Process*, one of the truly great works of twentieth century social theory, provides further insight into the mentality of the administrative state, although from a somewhat different perspective.<sup>108</sup> Noting the Western world's gradual elimination of interpersonal violence due to the central government's monopolization of force, Elias argues that the increasingly irenic behavior of individuals within this culture can be described as a civilizing process. It is characterized by the internalization of social control, a set of personal attitudes, purchased at varying levels of internal distress depending on the nature of the individual, that suppress basic human desires for violent self-assertion or retaliation.<sup>109</sup> This control arises from the increasingly interdependent nature of modern society, the differentiation of tasks that requires people to "attune their conduct to that of others."<sup>110</sup> Thus, the less dependent one person is upon another, the less the person's livelihood or well-being depends upon that other person, the

---

<sup>108</sup> Elias, supra note [ ], vol 2. Elias draws his model of human behavior from Freud, not from phenomenology, but his translation of Freudian psychology into a social theory ends up quite similar to Alfred Schutz's similar translation of phenomenology, see Alfred Schutz, *The Phenomenology of the Social World* (George Walsh & Frederick Lenhert, trans., 1967)

<sup>109</sup> Elias, supra note [ ], at 441-513.

<sup>110</sup> Id. at 445.

less “civilized” his behavior is likely to be. This lack of civility will not be manifested as violence, since the state insists on maintaining its monopoly of force, but as vindictive, resentful or impolite behavior.

#### B. A Dangerousness Proposal

A number of jurisdictions throughout the world have experimented with the use of ombudspersons. An ombudsperson is a government official who is authorized to receive complaints about other officials and to take some sort of action based on those complaints. Ombudspersons can also initiate investigations of their own to discover bureaucratic behavior toward individuals of the sort that might conceivably generate complaints, and then take the same sort of action. Whether an official who only conducted investigations of this nature, and did not receive citizen complaints, should be called an ombudsperson is a definitional nicety that need not be pursued for purposes of this discussion. It seems fairly clear, however, that the subject matter of the investigation must be the sort of action that might generate complaints; if it is misbehavior that does not have a direct effect on citizens, such as theft of government funds or disobedience of internal rules, we would tend to describe the government investigator in other terms.

The idea of an ombudsperson was developed in Scandanavia,<sup>111</sup> and has been recently adopted by the European Union.<sup>112</sup> It has been used fairly extensively in the English speaking world, particularly in the United Kingdom,<sup>113</sup> Canada<sup>114</sup> New Zealand,<sup>115</sup> and

---

<sup>111</sup> Ibrahim al-Wahab, *The Swedish Institution of Ombudsman* (1979); Roy Gregory & Philip Giddings, *Righting Wrongs: The Ombudsman in Six Continents* (2000); Walter Gellhorn, *Ombudsmen and Others: Citizens' Protectors in Nine Countries* (1966); Linda C. Reif, *The Ombudsman Concept* (1995).

<sup>112</sup> Marília Crespo Allen, *European Ombudsman and National Ombudsmen or Similar Bodies* (2001); Gerald Caiden, ed., *International Handbook of the Ombudsman: Evolution and Present Function* (1993); Katja Heede, *The European Ombudsman: Redress and Control at the Union Level* (2000).

<sup>113</sup> Roy Gregory & Peter Hutchesson, *The Parliamentary Ombudsman: A Study in the Control of Administrative Action* (1975); Roy Gregory & Philip Giddings, *The Ombudsman, the Citizen and Parliament: A History of the Office of the Parliamentary Commissioner for Administration and Health Service Commissioners* (2002); Carol Harlow & Richard Rawlings, *Law and*

India.<sup>116</sup> In the United States, it has generally been used for specific administrative programs at the federal level,<sup>117</sup> and implemented comprehensively in several states.<sup>118</sup> In the U.K., there are three separate groups of ombudspersons, one at the national level and having general jurisdiction, a second at the national level with jurisdiction over health-related matters, and a third for local government. Moreover, the mechanism has proven so popular that many government agencies and even private firms have developed their own ombudspersons.<sup>119</sup> In order to complain to the national ombudspersons, citizens must file their complaints with a member of

---

Administration 391-455 (1997); Mary Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (2002); H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 8<sup>th</sup> ed., at 87-112, 137-38 (2000).

<sup>114</sup> <http://www.ombudsman.on.ca> (visited on Jan. 3, 2005)

<sup>115</sup> L.B. Hill, *The Model Ombudsman: Institutionalizing New Zealand's Democratic Experience* (1976)

<sup>116</sup> M. P. Jain Lokpal: *Ombudsman in India* (1970); D.R. Saxena, *Ombudsman (Lokpal): Redress of Citizens' Grievances in India* (1987). India is at least arguably part of the English-speaking world. In any event, it has an ombudsperson.

<sup>117</sup> See, e.g., Older Americans Act, 42 U.S.C. § 3058 (ombudsman for long-term care patients); Indiana Code § 4-13-1.2 (ombudsman for prisoner complaints). Utah, true to form, has something they call an ombudsperson to aid in the prosecution of pornography. Utah Code Ann. § 67-5-18 (Supp. 2000). For a seminal, although now-outdated study of the use of this approach in the U.S., see Kenneth Culp Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. Pa. L. Rev. 1057 (1961). For a more contemporary survey, see Douglas Brandon et. al., *Self-Help: Extrajudicial Rights, Privileges & Remedies in Contemporary American Society*, 37 Vand. L. Rev. 1031 (1984).

<sup>118</sup> E.g., Alaska, Arizona; Hawaii, Iowa; Montana, Nebraska, Ohio, and Rhode Island. See [www.usombudsman.org](http://www.usombudsman.org) (visited on Jan. 4, 2005). A number of cities also have ombudspersons, such as Atlanta, Cleveland, Portland and Seattle, and New York City has an elected one.

<sup>119</sup> Patrick Birkenshaw, *Grievances, Remedies and the State* (1995), at 412-14 (prisons), 414-21 (police); Thomas Gibbons, *Regulating the Media*, 2<sup>nd</sup> ed., at 264-74 (1998).

the House of Commons, who then transmits it to the ombudsperson. This somewhat unusual arrangement makes the mechanism appear to resemble casework in the U.S., that is, interventions by legislators on behalf of important constituents.<sup>120</sup> In fact, the legislators in the U.K. perform a very general screening, or gate keeping function and transmit most of the complaints to the ombudsperson, rather than serving as the means of redress.<sup>121</sup> Once the ombudspersons have received the complaint, they investigate, and can then either advise the agency or recommend legislation.

Ombudsperson programs are designed to redress a range of problems regarding the performance of administrative agencies. The paradigmatic problem that they seem to envision is a substantive one – the agency has given the individual incorrect information, or incorrect treatment – rather than the more atmospheric one of oppressive behavior. This approach leads naturally to the sorts of advisory or hortatory responses that constitute the remedial repertoire of the existing programs. If the agency has made an error, all that seems necessary is to bring that error to the attention of a responsible official. That is, moreover, all that seems appropriate; there is no reason to punish the agency for the sorts of mistakes that inevitably occur in the complex process of administrative implementation. If systematic errors occur, they would seem to stem from the design of the authorizing legislation, and are properly addressed by recommendations to the legislature for the revision of the statute.

Suppose, however, that the ombudsperson mechanism were to be used to combat bureaucratic oppression. The problem here is not that its employees have made an error, but that they have engaged in conscious mistreatment of the individuals whose interests their agency is supposed to serve. In the most extreme case, they have improperly terrorized and excoriated someone, as the Very Important Person did to Akaky Akakyevich. In the more mundane and frequent case, they have treated someone with insensitivity and disrespect.

---

<sup>120</sup> Morris Fiorina, *Congress, Keystone of the Washington Establishment* 41-70 (1977); John Johannes, *To Serve the People: Congress and Constituency Service* 95-118 (1984); David Mayhew, *Congress: The Electoral Connection* 52-61 (1974)

<sup>121</sup> Roy Gregory & J. Pearson, *The Parliamentary Ombudsman After Twenty-five Years*, 70 *Public Admin.* 469; Harlow & Rawlings, *supra* note [ ], at 421-55; Richard Rawlings, *The MP's Complaints Service*, 53 *Mod. L. Rev.* 22 (1990)

The best solution, it would appear, is to engender respect for the agency's clients among its employees. If agency officials genuinely respect the clients, they would not behave like Gogol's Very Important Person, or like the bored, surly government clerk behind the metal counter. They would be gracious and genuinely considerate, thus eliminating oppression even in cases where they were required to deny the individual's request.

One means that might engender such respect is to make the clients dangerous persons for the employees. This could be achieved by authorizing the ombudsperson to punish employees when she received complaints about them. Every client would then represent a potential threat. Oppressive behavior might always elicit a complaint, and a complaint might always lead to punishment. According to the rational actor, or microeconomic approach to human behavior, this would make the employee wary of the clients, because the clients would be capable of taking action that would ultimately impair the employee's material self-interest. But according to the phenomenological approach described above, it would have the more comprehensive and profound effect of making the employees feel genuine respect for their justifiably dangerous clients. And in Elias' related view, it would increase the interdependence of the employees and their clients, by placing the well-being of the employees within the clients' partial control.

If the rational actor, or microeconomic motivations were the only ones involved, then the ombudsperson proposal, in making clients more dangerous to employees, might represent a significant degradation of their work environment. This result has in fact been observed by sociologists of work, in connection with both overt violence and confrontational behavior by customers.<sup>122</sup> But, as indicated above, the phenomenological impact of danger is often respect, and such respect then becomes a basis for the creation of genuinely rewarding interactions. An extensive empirical study of direct contacts between customers and employees in private firms found that employees often felt that personal interaction was the most satisfying part of their job, even when, or especially when, their

---

<sup>122</sup> See Carol Boyd, *Customer Violence and Employee Health and Safety*, 16 *Work, Employment & Soc.* 151 (2002); Kathryn Lively, *Client Contact and Emotional Labor*, 29 *Work & Occupations* 198 (2002); M.A. Mattingly, *Sources of Stress and Burn-Out in Professional Child-Care Work*, 6 *Child Care Q.* 127 (1977)

success depended upon the customers' reactions to them.<sup>123</sup> This result varied according to the nature of the firm, and could be counteracted by the presence of irate and unpleasant customers, but its presence suggests that the need to please people could generate a sincere willingness to treat them in a friendly and helpful manner.

To achieve this result, the relevant governmental jurisdiction would need to create an ombudspersons' office as a separate agency, completely independent of all other agencies, although not necessarily of the legislature. The ombudspersons would be authorized to receive complaints from individuals who believed that they had been treated poorly or improperly by an administrative official. Phone numbers and web sites for the ombudspersons would be prominently displayed in government offices. The ombudspersons could then investigate the complaint, and might also be authorized to investigate cases of mistreatment on their own initiative. If they found that oppressive behavior had occurred, they would have authority to sanction the offending official. Draconian sanctions, such as immediate dismissal, or even suspension from work, would be inappropriate except in the most egregious cases. To begin with, most oppressive behavior, while objectionable, is less than catastrophic; no one likes to be treated rudely or unhelpfully, but such treatment very rarely causes death, as it did in Akaky's case.<sup>124</sup> Second, officials must be accorded due process when they are sanctioned, and severe sanctions require too much process to be readily deployed. Finally, the point is to change the attitudes of existing officials, not to decimate an experienced workforce. Thus, the appropriate sanction, in most cases, would be administrative demerits, whose consequence might be denial of a bonus or a raise at the end of the year. Suspension or dismissal would result only if the employee accumulated a large number of demerits. That would indicate a consistent pattern that was more serious than an occasional lapse, it would establish a record that would satisfy due process requirements, and it would be imposed only on the most intractable officials.

This proposal is distinct from existing ombudspersons

---

<sup>123</sup> Steven Frenkel, Marek Korczynski, Karen Shire & May Tam, *On the Front Line: Organization of Work in the Information Economy* 198-229 (1999). See also Cas Wouters, *The Sociology of Emotions and Flight Attendants*, 6 *Theory, Culture & Soc.* 95 (1989)

<sup>124</sup> And he is, after all, a fictional character.

programs because it grants the ombudsperson authority to discipline administrative officials, quite apart from the authority that exists within the hierarchy of the officials' own institution. It grants this authority because its purpose is not to correct errors, or detect systematic defects in the authorizing statute, but to combat bureaucratic oppression. By making an agency's clients dangerous – by enabling them to initiate a process that can lead to a significant sanction for the employee – the proposal will engender not only instrumentally rational wariness on the part of the official, but phenomenologically experienced respect.

### C. The Advantages of Dangerous Clients

Establishing an ombudsperson with authority to impose sanctions on administrators in response to client complaints is a structural solution to the problem of bureaucratic oppression. It speaks directly to the status differences and divergent incentives that generate such oppression. The instrumentally rational response to sanctions that microeconomics predicts would be a change in the incentives of bureaucratic agents when dealing with individual clients. The meaning-based response predicted by phenomenology would engender more respectful attitudes toward those clients. The proposal does not address the issues of stranger relations or institutional pathology directly, but takes account of them through its effect on status relations and incentives. The institution's clients remain strangers, but the sense of threat that now accompanies them reduces the extent to which they must rely on familiarity to palliate the impact of bureaucratic oppression. The institution itself remains subject to organizational pathologies, but the forces acting on its employees can counteract these pathologies to some extent. If market forces can counteract the institutional pathologies of business firms, as James Q. Wilson asserts, then other forces should be able to fulfill this same role for administrative agencies.

As a structural solution, the ombudsperson program resolves a number of the difficulties that afflict other solutions to the problem of bureaucratic oppression. What distinguishes it from the due process approach is the informality of the complaint process. Due process can only be applied to adjudications, or administrative proceedings that resemble adjudications, because it is essentially a set of rules for determining whether an implementing agency is correctly applying pre-established rules to a particular individual. It would not extend to

being yelled at by a Very Important Person, or being told to stand in the another long line. But anything can be the subject of a complaint.

In addition, since the purpose of the complaint is merely to provide information to the ombudsperson, and initiate an investigation, complaints can take virtually any form, and thus do not require any legal knowledge, or even any degree of comfort with the legal system.

For the same reason, the ombudsperson can justifiably elicit complaints – by interviewing clients at random, for example, and asking them how they were treated.

Once the ombudsperson has investigated the issue, and decided to sanction a particular official, that official must be given due process. But this applies to the way the substantive standard is imposed. The standard itself, the criterion for judging the administrative agency's performance, is whether it has engaged in oppressive treatment of individuals, adjudicatory or otherwise. With a legally-based due process solution, due process is the substantive standard itself, that is, the only standard that is being imposed on the administrative agency is a requirement regarding its adjudicatory actions, not its general treatment of its clients. The negative aspects of due process, the possibility that it can become its own mode of oppression, stems from its role as a substantive standard. This occurs when the means of controlling bureaucratic oppression becomes an end in itself. Because the ombudsperson approach is less formal, its substantive standard can be defined as the problem in its totality, namely bureaucratic oppression, and thus avoid establishing intermediate standards that can lead to counterproductive results.

Unlike the idea of client-centered governance, the ombudsperson proposal avoids any appeal to the good will or the moral sensibilities of administrators, at any level. Of course, to initiate any governmental reform, someone needs to show good will, in this case a willingness to combat bureaucratic oppression. But since the basic problem resides in the attitudes of administrators, appeals to their good will are best avoided. The preferable approach is to design a program that can be instituted by the legislature, the primary policy maker in each American jurisdiction, and then functions without further need for rational, public-oriented behavior. This is what the ombudsperson program does. Once in place, it operates by applying sanctions to oppressive administrators, changing their behavior by appealing to their self-interest, and their attitudes through a phenomenological process that lies beyond their control.

The program should of course be accompanied by moral exhortation of its own. It would be bizarre to say to administrators: "You can just keep doing what you've been doing all along, but you'll be sorry." This sort of super-positivist approach to law as an order backed by sanctions is what Hart criticized so effectively in *The Concept of Law*.

<sup>125</sup> Any program to combat bureaucratic oppression would be based on a general condemnation of the practice, an exhortation to administrators to avoid it, and internal efforts within each agency to decrease it. But the ombudsperson program would add a forceful sanction, coming from outside the agency, to alter its existing practices. The nature of the sanction, moreover, should reinforce the hortatory aspect of the legislation by changing attitudes, and not merely behavior.

The ombudsperson approach resembles New Public Governance because it incorporates the clients of an administrative agency into the agency's structure; rather than merely admonishing administrators to be client-centered, it makes client-centeredness part of the agency's incentive structure. It has an advantage over New Public Governance because it does not require the clients to hold their own within that administrative structure. In the New Public Governance approach, clients must possess the skills or the persistence to ensure that the administrators really pay attention to them, and respond to their expressed needs and desires. With the ombudsperson program, clients only need to complain. By doing so, they will enlist the services of a professional administrator who will have all the necessary skills. On the other hand, New Public Governance is preferable because it involves more comprehensive participation by the clients, and a genuinely collaborative relationship between them and the agency. Which approach will actually work better in practice depends on one's views about the flexibility of administrators, and their willingness to listen to and learn from their clients. In all probability, these qualities will vary from agency to agency, and from time to time. The two approaches are not inconsistent however, because the ombudsperson approach, although based on more pessimistic assumptions about bureaucratic attitudes, is not simply intended to threaten administrators, but to generate an

---

<sup>125</sup> H.L.A. Hart, *The Concept of Law* 49-76 (1961).

internal feeling of respect for clients that is fully consistent with the genuine collaboration of New Public Governance.

Another way in which the ombudsperson program is consistent, and indeed supportive of, New Public Governance is that it provides a means of supervising semi-private entities as well as public ones. One aspect of New Public Governance is an increased reliance on private parties to carry out functions previously performed by public agencies.<sup>126</sup> Sometimes this involves the retention of a private contractor to run a program, like food services, or an institution, like a prison, as a profit-making activity.<sup>127</sup> Sometimes it involves the assignment of regulatory authority to an existing or specially-created private organization, as provided by the recent Sarbanes-Oxley Act.<sup>128</sup> In any event, the ombudsperson program can be used as effectively to monitor the behavior of the employees in these private entities as it can to monitor the officials of the government agencies they have replaced. The same complaint, investigation and sanctioning procedures would apply, and the private entity could be required to agree to these procedures as a condition of receiving its contract or authority. To be sure, those who are particularly sanguine about this mechanism might argue that the competitive environment in which the private entity exists – the market in general, or the market for government business in particular – will render such external discipline unnecessary. In that case, the ombudsperson would receive few valid complaints, and could be

---

<sup>126</sup> Jody Freeman, *The Private Role in Public Governance*, 75 NYU L. Rev. 543 (2000)

<sup>127</sup> See William Gormley, ed., *Privatization and Its Alternatives* (1991); Ira Robbins, *Privatization of Corrections: The Legal Dimensions of Private Incarceration*, in Ira Robbins, ed., *Prisoners and the Law* 22 (1996); Harold Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 Tex. L. Rev. 441 (1989); David Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165 (1999)

<sup>128</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), codified at 15 U.S.C. §§7201 to 7266 (2002). See Harold Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 Hastings Const. L.Q. 165 (1989); Harold Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62 (1990).

eliminated after a period of time. But the familiar agencies problems that afflict private firms suggest that this is an over-optimistic scenario, and that an ombudsperson in this setting would have plenty of business.

Finally, the ombudsperson idea is preferable to market mechanisms because it is applicable to the entire range of administrative agencies that interact with individuals. It addresses the problem of bureaucratic oppression with a program that requires only the political will to address that particular problem. Market mechanisms generally demand much more extensive changes in the administrative apparatus: either the outright abolition of government programs, or the transition from a centralized, hierarchically ordered system to one where individual units are granted semi-autonomy and encouraged to compete against each other. However greatly such changes appeal to certain people, they are extremely controversial, and their opponents can point to very serious potential dangers that they might incur. The effort to combat bureaucratic oppression of individuals need not, and should not, be used as a strategic device to secure these more far-reaching changes, particularly when it is not necessary to do so.

## Conclusion

Bureaucratic oppression is a ubiquitous problem, stemming from inherent features of modern government, but it is not an inevitable one. Administrative agencies, after all, are human artifacts, and can be changed to reflect our commitments. What appears to be lacking thus far is the political will to address the problem, and an effective strategy for solving it. This article is an attempt to remedy that second of those lacunae. It proposes that the familiar, but somewhat underused idea of an ombudsperson could be adapted to remedy bureaucratic oppression. The adaptation would give the ombudsperson more sanctioning authority than such officials currently possess, but the purpose would not be to punish, or even to deter, but to engender an internalized feeling of respect for the agency's clients. Gogol's *Overcoat* ends with the ghost of Akaky Akakyevich returning to terrify the government officials who have taken such an oppressive, imperious attitude toward those whom they are theoretically supposed to serve. The purpose of this proposal, however, is not to induce similar feelings of terror, but to alter the structure of administrative agencies so that the employees see their

clients as neither ghosts nor verminous intrusions, but as human beings.