Study N-300 February 13, 1997

Memorandum 97-12

Administrative Rulemaking: Interpretive Guidelines

BACKGROUND

At what point do an agency's interpretive guidelines become sufficiently regulatory in character that they should be adopted as regulations under the Administrative Procedure Act's rulemaking procedures? This is one of the most troublesome issues in administrative rulemaking. Because of ongoing problems and litigation in the area, interested parties have asked the Commission to give priority to this part of the rulemaking study, and the Commission has agreed.

Under federal law, a distinction is made between "legislative" rules, which must be formally adopted as regulations, and "interpretive" rules, which merely amplify the legislative policy and need not be adopted by means of the formal rulemaking procedure. California law does not make this distinction, but requires interpretive guidelines to be adopted as regulations. This memorandum opens the issue whether the California system requires change.

EXISTING CALIFORNIA LAW

The California Administrative Procedure Act prohibits a state agency from issuing, using, or enforcing any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that implements, interprets, or makes specific the law enforced or administered by it, or that governs its procedure, unless it has been adopted as a regulation under the rulemaking statute. Gov't Code §§ 11340.5, 11342(g). This requirement does not apply to a rule that relates only to the internal management of the agency.

This statute was originally added to the Administrative Procedure Act in 1982. Its purpose is to force agencies to use the rulemaking process and to preclude them from relying on "underground" regulations — rules imposed by the agency outside the standard regulatory process. It is consistent with prior case law holding that, under the Administrative Procedure Act, an agency's

interpretive guideline is invalid unless adopted as a regulation. Armistead v. State Personnel Bd., 22 Cal. 3d 198, 583 P.2d 744, 149 Cal. Rptr. 1 (1978).

PREVIOUS COMMISSION INVOLVEMENT

The Commission encountered complaints during its administrative adjudication study that some agencies , either openly or secretly, promulgate and transmit to administrative law judges "disciplinary guidelines". The Commission added to its administrative adjudication recommendation a provision that:

> **§ 11425.50. Decision**
>
> (e) A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).
>
> **Comment.** Subdivision (e) is consistent with the rulemaking provisions of the Administrative Procedure Act. See Section 11340.5 ("underground regulations"). A penalty based on a precedent decision does not violate subdivision (e). Section 11425.60 (precedent decisions). If a penalty is based on an "underground rule" — one not adopted as a regulation as required by the rulemaking provisions of the Administrative Procedure Act — a reviewing court should exercise discretion in deciding the appropriate remedy. Generally the court should remand to the agency to set a new penalty without reliance on the underground rule but without setting aside the balance of the decision. Remand would not be appropriate in the event that the penalty is, in light of the evidence, the *only* reasonable application of duly adopted law. Or a court might decide the appropriate penalty itself without giving the normal deference to agency discretionary judgments. See Armistead v. State Personnel Bd., 22 Cal. 3d 198, 583 P.2d 744, 149 Cal. Rptr. 1 (1978).

This provision becomes operative July 1. The Commission conceived that the provision as simply a specific application of the existing general prohibition on underground regulations.

TIDEWATER CASE

A recent California Supreme Court decision revisits the issue of interpretive guidelines. Tidewater Marine Western, Inc. v. Bradshaw (filed December 19,

1996), concludes that interpretive guidelines used by the Division of Labor Standards Enforcement (DLSE) to implement wage orders of the Industrial Welfare Commission amount to regulations and are therefore void because not adopted in accordance with the Administrative Procedure Act.

In concluding that these interpretive guidelines are "regulations" within the meaning of the Administrative Procedure Act, the court notes that a regulation has two principal identifying characteristics:

(1) The agency intends its rule to apply generally, rather than in a specific case.

(2) The rule implements, interprets, or makes specific the law enforced or administered by the agency or govern the agency's procedure.

However, a policy manual that does no more than restate or summarize, without commentary, the agency's previous adjudicative decisions and advice letters is not a regulation.

Applying this test to the interpretive guidelines involved in the *Tidewater* case, the court concluded that the guidelines are "regulations" that should have been adopted pursuant to the Administrative Procedure Act. The court also disapproved two Court of Appeal decisions which had erroneously determined that certain interpretive guidelines are not regulations:

(1) DLSE's written policy for calculating overtime pay, at issue in Skyline Homes v. Department of Industrial Relations, 165 Cal. App. 3d 239 (1985), should have been classified as a regulation within the meaning of the APA because it was a standard of general application interpreting the law DLSE enforced and not merely a restatement of prior agency decisions or advice letters.

(2) DLSE's interpretation of a wage order concerning payment of employees required to remain on the premises during lunch breaks, litigated in Bono Enterprises v. Bradshaw, 32 Cal. App. 4th 968 (1995), applied generally to a class of similar cases and did not merely restate or summarize DLSE's prior decisions or advice letters.

CRITICISM OF CALIFORNIA RULE

Professor Michael Asimow has written an article in which he criticizes the California rule — *California Underground Regulations*, 44 Administrative Law Review 43 (No. 1 Winter 1992). A copy of this article is reproduced at Exhibit

pages 1-35. He has also previously sent the Commission a memorandum summarizing his views on this issue.

Professor Asimow's basic points are that California's formal rulemaking procedure is very time-consuming and costly — the most extensive in the nation. The net effect of applying these requirements to interpretive guidelines is to discourage agencies from telling the public what the agency thinks the law means or how the agency intends to exercise discretion. It is so expensive and difficult to adopt guidance documents through the rulemaking process that agencies seldom attempt to do so. Professor Asimow's empirical research indicates that agencies simply fail to adopt guidance documents (leaving the public and staff to wonder what the law means), use case by case adjudication instead of rulemaking, resort to seeking legislation (which is quicker and cheaper to obtain than adopting a rule), skirt the law by various techniques of dubious legality, or flout the law and hope not to get caught.

Professor Asimow states that the public needs to know what agencies think the law means or how the agency intends to exercise discretion. Disclosure of this information facilitates law enforcement since it enables people to know what the agency expects. Guidance documents improve administration by assuring that all staff members take the same approach to a problem. Finally, such documents help members of the public to plan their affairs and thus minimize transaction costs. Agencies should be encouraged to formulate their views in guidance documents and publish them as required by law. There cannot be too many guidance documents. But present law strongly deters agencies from adopting them or publicizing the ones they adopt.

The California Energy Commission (CEC) supports Professor Asimow's position. CEC agrees that the California rulemaking process is so full of burdensome restrictions that there is an strong incentive for agencies to resort to unofficial and unadopted rules which increasingly are the only way many agencies are able to readily respond to their regulated constituencies. CEC has previously written us that:

> In reality, it is impractical, undesirable, and politically unacceptable for agencies to remain totally silent when a regulated business or industry asks what a regulation means with regard to a particular issue, and millions of dollars may hang in the balance concerning what the answer may be. Faced with this situation, it is unrealistic and irresponsible for an agency to respond only with, "we'll cover it next year in our rulemaking." California business

> would be even less tolerant than the general public of such agency unresponsiveness. Thus as a practical matter, agencies issue interpretations of their statutes. These are expressed in various forms, sometimes oral, sometimes by staff letter, and occasionally by formal agency action. In my experience, these interpretations are typically solicited by California business confronted with a regulatory problem, seeking relief from regulatory inflexibility or ambiguity.

Professor Asimow indicates, though, that some of the private sector people he interviewed disagree with him on this issue very strongly. Also the Office of Administrative Law personnel he interviewed disagree.

But OAL in its amicus submission in *Tidewater* indicates that, "OAL agrees with Professor Asimow that it is time to carefully review the California APA's treatment of 'interpretive rules.'" OAL has written to the Commission generally that, "Though we believe the present statutory framework is fundamentally sound, we welcome the opportunity to discuss suggestions for specific improvements. OAL's long term objective is to make the rulemaking part of the APA less burdensome for state agencies, while preserving public participation and the benefits of independent legal review of proposed regulations."

The Supreme Court in *Tidewater,* states:

> Professor Asimow identifies serious concerns. Though too many regulations may lead to confusing, conflicting, or unduly burdensome regulatory mandates that stifle individual initiative, this effect is less pronounced in the case of interpretive regulations. The public generally benefits if agencies can easily adopt interpretive regulations because interpretive regulations clarify ambiguities in the law and ensure agency-wide uniformity. In addition, agencies cannot always respond to changing circumstances promptly if they must ask the Legislature for a statutory amendment or resort to a regulatory process fraught with delays. Finally, if an agency simply ignores the APA, it ceases to be responsive to the public, and its regulations are vulnerable to attack in the courts.

The court declined, however, to judicially modify existing California law. "If in some circumstances agencies should also be free to adopt regulations informally and without following the APA's elaborate procedures, then the Legislature should state what those circumstances are and what lesser procedural protections are appropriate. Until it does, we decline to carve out an exception

for interpretive regulations that we do not believe the language of the APA adequately supports."

ALTERNATIVE APPROACHES

Federal APA

The federal APA provides that the rulemaking procedure does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 USC § 553(b)(A). These rules must be published in the Federal Register. 5 USC § 552(a)(1)(B)-(D).

While Professor Asimow believes this is sound policy, he sees some disadvantages to the federal model, primarily resulting from a failure to define the categories that are exempt. However, the cases have worked out a rough means of determining whether a particular rule falls within an exempt category.

OAL, in its amicus brief draft for *Tidewater*, criticizes the federal rule for creating a distinction between "legislative" and "interpretive" rules that is difficult — characterized by a federal appellate court as "fuzzy" and by Professor Asimow as "difficult to apply in practice ... the subject of constant litigation."

1981 Model State APA

Section 3-109 of the 1981 Model State APA provides:

> (a) An agency need not follow the provisions of [the rulemaking statute] in the adoption of a rule that only defines the meaning of a statute or other provision of law or precedent if the agency does not possess delegated authority to bind the courts to any extent with this definition. A rule adopted under this subsection must include a statement that it was adopted under this subsection when it is published in the [administrative bulletin], and there must be an indication to that effect adjacent to the rule when it is published in the [administrative code].
>
> (b) A reviewing court shall determine wholly de novo the validity of a rule within the scope of subsection (a) that is adopted without complying with the provisions of [the rulemaking statute].

Professor Asimow thinks this provision, while generally salutary, will result in confusion and litigation. Agencies often have power to adopt their nonlegislative rules as legislative rules, but this provision would invalidate those nonlegislative rules and result in litigation over the exact extent of the agency's power. De novo court review also is misguided.

Washington APA

A number of states have enacted statutes that exempt interpretive guidelines from the standard rulemaking process. Professor Asimow suggests that the Commission consider something like the recent Washington statute. That statute distinguishes interpretive statements and policy statements from rules and allows them to be adopted without rulemaking procedure. Guidance documents must be clearly labeled as such and are advisory only.

He also believes these documents should be conveniently published (not necessarily in the Code of Regulations). Probably each agency could be required to periodically publish its guidance documents in a generally available format.

FOCUS ON THE WASHINGTON STATUTE

Text of Washington Statute

The key relevant provisions of the Washington statute are set out below.

> **Interpretive and Policy Statements Exempted**
>
> If the adoption of rules is not feasible and practicable, an agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. An agency is encouraged to convert long-standing interpretive and policy statements into rules.
>
> Wash. Rev. Code § 34.05.230(1)

> **Interpretive Statement Defined**
>
> "Interpretive statement" means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.
>
> Wash. Rev. Code § 34.05.010(8)

> **Policy Statement Defined**
>
> "Policy statement" means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.
>
> Wash. Rev. Code § 34.05.010(14)

Rule Defined

"Rule" means any agency order, directive, or regulation of general applicability

(a) the violation of which subjects a person to a penalty or administrative sanction;

(b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings;

(c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law;

(d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession;

or

(e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.

Wash. Rev. Code § 34.05.010(15)

Advantages of Washington Statute

Professor Asimow notes that Washington's definition of "rule" clearly is designed to be limited to legislative rules and to exclude interpretive and policy statements. Under this scheme, a rule has legal effect while an interpretive or policy statement is advisory only. The statute also encourages an agency to convert is interpretive and policy statements into rules when it is feasible and practicable to do so.

Professor Asimow comments that the drafters of the Washington statute in 1988 came to the same conclusion as those who wrote the federal act in 1946 — they should encourage, not deter, the adoption of guidance material for the public.

He believes the Washington statute is superior to the others that exist because it meticulously defines the terms involved and prescribes the procedure by which an agency may adopt an exempt interpretive or policy statement. This should forestall most of the confusion that has arisen under the federal act. (The staff notes that no reported Washington case has been called upon to construe this statute.)

Issues Concerning Washington Statute

OAL, in its amicus brief draft for *Tidewater*, identifies issues it believes would need to be addressed if we were to adopt a statute such as Washington's exempting interpretive guidelines from the rulemaking process:

(1) How to define "interpretive rule".

(2) How to define "policy statement".

(3) Whether, where, and how often these types of rules should be published.

(4) How to clearly label these rules as "nonlegislative" and "advisory".

(5) The extent to which these rules should bind the adopting agency, the public, or the courts.

(6) Whether these rules should be subject to review by the Governor, OAL, or a legislative body.

(7) Whether the agency must adopt a "concise explanatory statement".

(8) Whether the agency must prepare a rulemaking record of some sort.

(9) When the rules become effective.

(10) Whether statutes authorizing the regulated public to petition agencies for adoption and amendment of rules apply.

(11) Verification that money has been appropriated to reimburse local agencies for costs mandated by the state rule.

OTHER OPTIONS

"Direct Final" Rulemaking

An indirect method of dealing with interpretive guidelines that the Commission might wish to consider if it declines to deal with them directly, is the "direct final" rulemaking procedure being used increasingly at the federal level. Under this approach an agency publishes notice of intent to adopt rules for which the ordinary rulemaking process is unnecessary (because their impact is trivial or transitory). If any person objects to this truncated procedure, the normal rulemaking process is used. Professor Asimow points out that the vast majority of interpretive guidelines are uncontroversial. The truncated procedure might be a useful option to incorporate in the Administrative Procedure Act if the Commission decides not to deal with interpretive guidelines directly.

Codification of Rules Announced in Tidewater Case

If the Commission is not inclined to revise existing California law on interpretive guidelines, Professor Asimow suggests that at least the California

statutes should clearly state the exceptions to the rulemaking requirement articulated by the Supreme Court in *Tidewater*. There are at least three of these:

(1) If an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not required to use the rulemaking procedure. A policy manual of this kind would be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes. This rule announced in *Tidewater* appears to change existing law.

(2) An interpretation of a law that "is the only reasonable interpretation" is a direct application of the law and therefore not subject to the rulemaking procedure. This concept is touched upon and not disapproved by the court in the case. It is apparently followed by OAL as a matter of practice.

(3) The remedy, if an interpretive guideline is not properly adopted, is for the court to exercise its independent judgment on the subject of the guideline. The court should not be required to overturn agency action that is legally proper in the opinion of the court, just because the agency action was taken pursuant to an improperly adopted guideline. This overrules prior case law.

WHERE DO WE GO FROM HERE?

After receiving communications and hearing discussion on these issues from interested parties, the Commission needs to decide what makes sense as a matter of policy. The staff will then begin the process of trying to implement policy with draft statutory language.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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CALIFORNIA UNDERGROUND REGULATIONS

*Michael Asimow**

The law that agencies administer often requires interpretation, and the discretion that agencies exercise often needs to be structured. Members of the public who live and do business in the shadow of regulation need to learn what the agency thinks the law means and how discretion may be exercised. Increasing the level of people's understanding about what the law requires of them is a good thing for society; it reduces the number of unintentional law violations, and it reduces the transaction costs incurred in planning private transactions.[1] Agency staff members also require authoritative information about these subjects in order to apply the law consistently, fairly, and efficiently. Administrative procedures should not discourage agencies from interpreting law and structuring discretion. This article discusses California statutory and judicial doctrines and practices that have exactly this deterrent effect.

In an era in which the demands on government are steadily increasing while the resources available to government are steadily falling, it is vital that the regulation of bureaucratic activity be scrutinized carefully. Inhibitions on agencies that cannot survive a cost-benefit test need to be scrapped.[2] Deregulation may be just as appropriate when it is applied to bureaucracy as when it is applied to private sector economic activity. This article discusses California regulation of bureaucratic behavior that is very costly to government and to the public but produces relatively little benefit for anyone.

*Professor of Law, UCLA Law School. The author is a consultant to the California Law Revision Commission and is engaged in a study of California administrative law for the Commission. However, the Commission has not considered nor passed upon the conclusions expressed in this article. The assistance of Robert Anthony, Arthur Bonfield, Robert Fellmeth, Gregory Ogden, Craig Oren, Gary Schwartz, and Peter Strauss is gratefully acknowledged. In particular, Herbert F. Bolz of the Office of Administrative Law, who thoroughly disagrees with my conclusions, was unstinting in his assistance. Of course, responsibility for any errors that remain is mine.

1. *See generally* MICHAEL ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES 11–15 (1973) (responsibility of government to furnish advice to diminish uncertainty).

2. *See* Arthur Bonfield, *Administrative Procedure Acts in an Era of Comparative Scarcity*, 75 IOWA L. REV. 845 (1990).

I. NONLEGISLATIVE RULES AND NOTICE AND COMMENT PROCEDURE

A fundamental distinction in administrative law is between legislative and nonlegislative rules. Legislative rules are adopted pursuant to a delegation of power from the legislature and are themselves law; by their own force, they affect legal rights and obligations of those subject to them.

In contrast, nonlegislative rules are agency pronouncements of general applicability and future effect that are not adopted pursuant to a legislative delegation of rulemaking power. While sometimes difficult to identify and classify, nonlegislative rules fall into one of three classes: rules that interpret law ("interpretive rules"), rules that limit discretion ("policy statements"), and rules of internal management and procedure.[3] While they are frequently of great practical importance, nonlegislative rules do not alter legal rights and obligations. Instead, they function largely as guidance documents—explaining to the public and to agency staff how the agency believes law should be interpreted, discretion should be exercised, or agency functions carried out.

Nonlegislative rules raise numerous fundamental problems of administrative law, including the question of the appropriate process for adopting them.[4] Under the federal Administrative Procedure Act (APA), interpretive rules, policy statements, and procedural rules are exempt from any required procedure before or after adoption,[5] although they must be published in the *Federal Register* if they have general applicability.[6] While the Model State APA of 1961,[7] on which numerous state APAs are based, contains no such exemptions,[8] the states have mostly ignored its requirements of pre-adoption procedure for nonlegislative rules.[9] The Model State

3. Procedural rules are sometimes adopted pursuant to a delegation of legislative power. Thus, they can be either legislative or nonlegislative.

4. Nonlegislative rules can raise numerous other issues. For example, (i) is the adopting agency bound by the rule, (ii) can a nonlegislative rule be retroactive, (iii) must such rules be published in collections like the *Federal Register* or the *Code of Federal Regulations*—and what happens if they are not, (iv) is the rule ripe for judicial review, and (v) what is the scope of judicial review of the rule? These issues will not be discussed in this article except incidentally.

5. 5 U.S.C. § 553(b)(A) (1988). Under this provision, the customary notice and comment procedure does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." Nonlegislative rules are also exempt from the thirty-day, pre-effective date period. *Id.* § 553(d)(2). All rules, legislative and nonlegislative, are subject to the right of an interested person to petition for the issuance, amendment, or repeal of a rule. *Id.* § 553(e). The APA uses the word "interpretative" but the author prefers the word "interpretive" for stylistic reasons. Both words are in common use.

6. *Id.* § 552(a)(1)(B)–(D) (1988).

7. 15 U.L.A. 147 (1990).

8. The 1961 Act does contain an exception for intra-agency memoranda. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(7)(c) (1961), 15 U.L.A. 147, 148 (1990).

9. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3–109 cmt. (1981), 15 U.L.A. 1, 45 (1990) ("First, although the agencies in almost all states act in their daily practice as if interpretative rules are entirely exempt from the rule-making requirements of their state administrative procedure acts, the 1961 Revised Model Act and most state acts do not contain such an exemption for interpretative rules."); ARTHUR E. BONFIELD, STATE ADMINISTRA-

APA of 1981 (1981 MSAPA),[10] parts of which have now been adopted in several states, contains partial exemptions for interpretive rules and for certain criteria and guidelines. Several recently adopted state statutes contain carefully drawn exemptions that are broader than those in 1981 MSAPA.[11]

California, standing alone, requires and strongly enforces elaborate pre-adoption procedure for nonlegislative rules—"underground regulations" in California parlance.[12] This procedure includes not only notice and comment procedure, an oral hearing on request, and required response to every comment, but also mandatory scrutiny of every rule—legislative or nonlegislative—by the Office of Administrative Law (OAL). California rulemaking procedure probably surpasses that of any other state, and far surpasses the federal government, in the number of steps required, the rigor with which the law is enforced, and in breadth of application.[13]

Notice and comment rulemaking is generally regarded as a successful innovation in modern government. Rulemaking procedure entails a give-and-take with the public that often results in better and clearer rules. A regulated party is less likely to resist a regulatory scheme if allowed to play a role in shaping the scheme. And rulemaking procedure is well designed to facilitate at low cost the legislature's obligation of agency oversight.[14] More fundamentally, notice and comment procedure is a significant medium for democratic expression; it tends to offset the absence of political accountability of administrative agencies.

In an ideal world, perhaps, all rules should be adopted only after prior notice and comment procedure and scrutiny by an independent entity like OAL. But we live in a less than ideal world, in which administrative agencies have austere budgets and drastically limited staff resources; they must constantly establish priorities among the possible uses of those resources. Yet agencies must grapple with regulatory problems that require intensive use of their resources and quick responses. Among numerous other respon-

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TIVE RULE MAKING 291–93 (1986) (mentioning California as the only exception); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 410 & n.137.

For a rare exception, see Detroit Based Coalition for the Human Rights of the Handicapped v. Department of Social Servs., 431 Mich. 172, 428 N.W.2d 335 (1988), invalidating a "policy bulletin" that instituted a system of telephone hearings in welfare cases. The court held that the bulletin did not fall within various statutory exceptions to rulemaking procedure. *See infra* text accompanying notes 112–18.

10. 15 U.L.A. 1 (1990).

11. *See infra* text accompanying notes 119–24.

12. Some people use the term "underground regulations" to refer to any regulation that should have been but was not adopted in compliance with the APA. I use the term more narrowly here to refer to nonlegislative regulations.

13. California is not unique in applying rulemaking procedure to nonlegislative rules but probably is unique in strongly enforcing rulemaking requirements for such rules. California excepts certain agencies from rulemaking procedures, and thus, may in this respect have narrower coverage than in some other states. *See infra* note 88.

14. *See* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

sibilities, they must routinely furnish guidance to staff members and to the public, an agency function of great importance in an era of intensive regulation of many businesses and vast quantities of complex regulatory and statutory material. In a world of second best, the optimal procedure for the adoption of guidance rules might be very different from one appropriate in an ideal world.[15]

II. ADOPTION OF NONLEGISLATIVE RULES UNDER CALIFORNIA LAW

A. Background

The California APA was adopted in 1945,[16] thus preceding adoption of the federal act and of those in most other states. The original statute lacked rulemaking provisions, but in 1947 California amended its APA to include a notice, comment, and publication system similar to the federal model.[17] The 1947 amendment defined "regulation" quite broadly[18] and contained an exception for rules of internal management[19] but not for nonlegislative rules.[20] The notice and comment procedure (but not the requirements for

15. This article criticizes the California requirements for preadoption procedures for nonlegislative rules. It does not criticize the requirements that such rules be publicized. Clearly, nonlegislative rules should be readily accessible to the public. The problem with underground rules is that they are often hidden underground, *not* that they are adopted without elaborate procedures.

16. Act effective Sept. 15, 1945, ch. 867, 1945 Cal. Stat. 1626.

17. Act effective Sept. 19, 1947, ch. 1425, 1947 Cal. Stat. 2984. *See* ASSEMBLY INTERIM COMMITTEE ON ADMINISTRATIVE REGULATION, REPORT TO THE 57TH GENERAL SESSION OF THE CALIFORNIA LEGISLATURE (1947), *reprinted in* CAL. ASSEMBLY J., Feb. 3, 1947, at 1290–1301 [hereinafter INTERIM COMMITTEE REPORT]. The report indicates that the Committee was influenced both by the federal APA and by the APAs of several other states. *See* Ralph N. Kleps, *The California Administrative Procedure Act* (1947), 22 CAL. ST. B.J. 391, 393–95 (1947).

For earlier history, see Act effective Sept. 13, 1941, ch. 628, 1941 Cal. Stat. 2087 (filing and publishing requirements); Act effective Aug. 4, 1943, ch. 1060, 1943 Cal. Stat. 3003 (appropriation); John G. Clarkson, *The History of the California Administrative Procedure Act*, 15 HASTINGS L.J. 237, 243, 249 (1964); J. Albert Hutchinson, *Rule Making Function of California Administrative Agencies*, 15 HASTINGS L.J. 272, 274 (1964); Ralph N. Kleps, *What Safeguards Should the California Legislature Provide for Administrative Rule Making?*, 22 L.A. B. BULL. 201, 202 (1947).

18. " 'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency." This definition has survived and is presently found in CAL. GOV'T CODE § 11342(b) (West Supp. 1991).

19. *See infra* notes 139–44.

20. It appears the omission was intentional. A rejected bill did contain exceptions for interpretive and procedural rules parallel to the federal Act. *See* Kleps, *supra* note 17, at 213–16 (arguing that the legislature should provide for these exceptions). The implications of this omission are discussed further *infra* note 128.

filing and publication) included an exception for emergencies.[21] In language that survives in the existing statute where it now seems rather quaint, the legislature recited that its purpose was to establish "basic minimum procedural requirements" for the adoption of regulations.[22] Several early cases under the act found various techniques to avoid subjecting nonlegislative rules to the statutory regimen[23] and its application to such rules was unclear.[24]

B. *Armistead*

The California Supreme Court's 1978 decision in *Armistead v. State Personnel Board*[25] committed California to APA procedure for adoption of nonlegislative rules. The issue in *Armistead* was whether the court should defer to an interpretation embodied in the State Personnel Board's manual.[26] The court held that the interpretation should have been adopted as a regulation. It was invalid because the agency had not engaged in any pre-adoption process and, consequently, the court declined to defer to it.

The unanimous decision in *Armistead* cited no cases and provided little reasoning. It relied on a 1955 legislative committee study, which criticized the Personnel Board for burying regulations in its manual.[27] The court's

21. The provision for emergency regulations survives in the present statute, CAL. GOV'T CODE § 11346.1(b) (West Supp. 1991), but is now more narrowly drawn. *See infra* notes 51, 78. From 1949 to 1987, the notice and comment sections also contained an exception for procedural rules. Act effective Oct. 1, 1949, ch. 313, 1949 Cal. Stat. 600, 601, *repealed by* Chapter 1375, 1987 Cal. Stat. 5001, 5007.

22. CAL. GOV'T CODE § 11346 (West 1980).

23. *See, e.g.*, Faulkner v. California Toll Bridge Auth., 40 Cal. 2d 317, 323–24, 253 P.2d 659, 663–64 (Cal. 1953) (resolutions to build a bridge are of particular, not general, applicability despite effect on great numbers of people; also resolutions are "steps in the performance of a statutory duty, rather than acts which would 'implement, interpret, or make specific the law' "); Hubbs v. California Dep't of Pub. Works, 36 Cal. App. 3d 1005, 1010, 112 Cal. Rptr. 172, 175 (Cal. Ct. App. 1974) (APA not applicable to Department's leasing program because of absence of delegated legislative power); American Friends Serv. Comm. v. Procunier, 33 Cal. App. 3d 252, 262–63, 109 Cal. Rptr. 22, 28–29 (Cal. Ct. App. 1973) (legislature did not intend to subject prison regulations to the APA); City of San Joaquin v. State Bd. of Equalization, 9 Cal. App. 3d 365, 375, 88 Cal. Rptr. 12, 20 (Cal. Ct. App. 1970) (statistical accounting technique is not a regulation).

24. *See* Hutchinson, *supra* note 17, at 275 (rulemaking provisions do not contemplate administrative interpretation as contrasted with implementation of substantive enactments).

25. 22 Cal. 3d 198, 583 P.2d 744, 149 Cal. Rptr. 1 (1978).

26. *Armistead* concerned an employee of the Department of Water Resources who first resigned, then withdrew his resignation. A legislative regulation provided that an employee could resign by submitting a written resignation. The interpretation stated that an employer agency could accept the resignation and refuse to accept its withdrawal.

27. 22 Cal. 3d at 203, 583 P.2d at 746, 149 Cal. Rptr. at 3. The study criticized the burying of rules of conduct in "house rules" including interpretations, bulletins, and the like, and mentioned the Personnel Board among many other offenders. SENATE INTERIM COMMITTEE ON ADMINISTRATIVE REGULATION, FIRST REPORT TO THE 1955 LEGISLATURE OF THE STATE OF CALIFORNIA 9, 38 (1955). The Committee's criticisms were first raised in an earlier report. SENATE INTERIM COMMITTEE ON ADMINISTRATIVE REGULATIONS, PRELIMINARY AND PARTIAL REPORT 7–8 (1952). Needless to say, the views of a legislative committee expressed eight years after enactment of the statute being construed are entitled to little, if any, weight.

decision deliberately rejected the federal model[28] and apparently required pre-adoption notice and comment procedure for all agency pronouncements that could be considered "regulations."

Moreover, the *Armistead* decision narrowly construed the statutory exception for "internal management,"[29] again with little discussion or analysis. Because the interpretation went beyond "internal rules which may govern the [Board's] procedure" and involved the interests of persons outside of the Personnel Board (that is, employees of other state agencies), the interpretation did not fall within the exception for internal management.

C. The 1979 Statutory Revision

The rulemaking procedures in effect at the time *Armistead* was decided were similar to the bare-bones notice and comment model in the federal APA. Thus, the Supreme Court probably thought that compliance with its decision would not prove burdensome.

Regulatory reform and deregulation came into vogue in the late 1970s and California, as always, was on the cutting edge. The 1979 amendments to the California APA drastically revised California's rulemaking procedures.[30] The legislature explicitly sought to decrease the number of regulations as well as to improve their quality.[31] The 1979 revision called for an awesomely complex pre-adoption procedure, and it has been frequently amended since 1979 to add still more bells and whistles.

Under the California APA, a notice of proposed rulemaking (as well as the statement of reasons accompanying the final rule) must include consideration of the costs and benefits of the proposed regulation and less restrictive alternatives.[32] It must contain an evaluation of the interests of small

28. "Concerning the Legislature's intent as to agency rulemaking generally, two sections of the Government Code are illuminating (and demonstrate a desire to achieve in the California APA a much greater coverage of rules than Congress sought in the federal APA)." *Armistead*, 22 Cal. 3d at 201–02, 583 P.2d at 745, 149 Cal. Rptr. at 2 (citing the federal APA provisions and Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521 (1977)). The two sections of the Government Code referred to are present sections 11342(b) (defining regulation and quoted *supra* note 18) and 11346 (purpose of the statute, quoted *infra* note 125).

29. The term "regulation" does not include "one which relates only to the internal management of the state agency." The complete definition of "regulation" appears *supra* note 18.

30. The changes are often referred to by the bill number, A.B. 1111, and are contained in Chapter 567, 1979 Cal. Stat. 1778. *See generally* Linda S. Brewer & Michael McNamer, *Rulemaking Procedure*, *in* 1 CALIFORNIA PUBLIC AGENCY PRACTICE § 21 (Gregory Ogden ed., 1991).

31. The legislature's purposes for this revision are stated in CAL. GOV'T CODE §§ 11340, 11340.1 (West Supp. 1991). According to these sections, there has been an unprecedented growth in the number of regulations; the language is frequently unclear and unnecessarily complex; substantial time and public funds have been spent in adopting regulations, the necessity for which has not been established; correcting the problems caused by the unprecedented growth of regulations in California requires the direct involvement of the legislature as well as that of the executive branch.

32. *Id.* §§ 11346.14(b), 11346.5(a)(7), 11346.7(b)(4) (West Supp. 1991).

business,[33] housing costs,[34] costs to state or local government,[35] preference for performance over prescriptive standards,[36] and numerous other factors.

The notice and final statement of reasons must contain a description of the problem addressed; an "informative digest" containing an analysis of existing state and federal law and regulations;[37] and analysis of the specific purpose of the regulation and the rationale for the agency's determination that the regulation is reasonably necessary to carry out those purposes.[38] It must identify each technical, theoretical, and empirical study or report on which the agency relies.[39] If there is *any* change from the originally proposed regulation, the agency must renotice the regulation for an additional comment period of at least fifteen days.[40] The information contained in the initial statement of reasons must be updated in the statement of reasons accompanying the final regulation.[41]

The final regulation must also contain a summary of *each* objection or recommendation submitted during the comment period and an explanation of how the proposed action was changed to accommodate each objection or recommendation, or the reasons for making no change.[42] No less than forty-five days after publication of the original notice, a public hearing must be held if *any* interested person requests one.[43] No material can be added to the record after the close of the public hearing or comment period unless there is additional public comment thereon.[44] The statute carefully defines the record, requires the agency to index the record,[45] and apparently makes

33. *Id.* §§ 11342(e), 11346.4(a)(3), 11346.53, 11346.7(a)(4), 11346.7(b)(5).
34. *Id.* §§ 11346.52, .55.
35. *Id.* §§ 11346.5(a)(5), (6); 11346.7(b)(3).
36. *Id.* §§ 11342.01, 11346.14(a), (b).
37. *Id.* §§ 11346.5(a)(3), 11346.7(c).
38. *Id.* § 11346.7(a)(1), (2).
39. *Id.* § 11346.7(a)(3).
40. *Id.* § 11346.8(c); CAL. CODE REGS. tit. 1, § 44 (1990). The fifteen-day notice provision applies only if the change was sufficiently related to the original text such that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If the change does not meet this test, it is necessary to start over from scratch. *Id.*
41. CAL. GOV'T CODE § 11346.7(b) (West Supp. 1991). If any new technical, theoretical, or empirical study, report or similar document was not earlier disclosed to the public, the agency must provide an additional period for comment on such material. *Id.* §§ 11346.7(b)(1), .8(d).
42. *Id.* § 11346.7(b)(3). This requirement is strongly enforced by OAL. *See* Marsha N. Cohen, *Regulatory Reform: Assessing the California Plan*, 1983 DUKE L.J. 231, 249–51. Thus, in Department of Mental Health, Cal. Regulatory Notice Reg. 90, No. 34-Z, 1280, 1284 (OAL Decision 1990) (disapproval of reg. action), OAL stated: "Unfortunately, the Department failed to adequately summarize and/or respond to *portions* of comments received from several commenters."
43. CAL. GOV'T CODE §§ 11346.4(a), .8(a) (West Supp. 1991). Notice of the hearing (and of any dates to which it is postponed) must be provided to everyone who filed a request for same and to a representative sample of small businesses. *Id.* §§ 11346.4(a), .8(a), (b) (West Supp. 1991).
44. *Id.* § 11346.8(d).
45. *Id.* § 11347.3

the record exclusive for judicial review purposes.[46] On judicial review, a regulation may be declared invalid for a substantial failure to comply with procedural requirements; it is also invalid if the agency's determination that the regulation is *reasonably necessary* to effectuate the purpose of the statute is not supported by *substantial evidence* in the rulemaking file.[47]

Yet all of this is only prologue to the real drama: scrutiny of *every* regulation by the OAL. OAL was created by the 1979 legislation to serve as an executive-branch watchdog on the rulemaking of almost all California agencies.[48] OAL reviews rules for authority, clarity, consistency, reference, nonduplication, and even for necessity[49] as well as for compliance with all of the elaborate notice, comment, and response requirements set forth in the statute.[50]

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46. *Id.* §§ 11346.8(d), 11347.3(c), 11350(b). *See* BONFIELD, *supra* note 9, at 351–62; Cohen, *supra* note 42, at 253–56 (both criticizing the notion that the rulemaking file must be the exclusive record for judicial review purposes).

47. CAL. GOV'T CODE § 11350(a), (b) (West Supp. 1991). Thus, the substantial evidence rule, not the familiar arbitrary and capricious approach, is used in the review of *all* rules. The rulemaking record must, in all cases, contain substantial evidence of the reasonable necessity for the rule or it must be set aside.

48. *Id.* §§ 11349–11349.11. The political rationale for the creation of OAL was the desire by the Democratic leadership of the legislature to fend off initiative provisions that would have created a legislative veto of regulations. The veto proposals were considered even more intrusive than OAL review because of the risk that special interests in the legislature could stymie the regulatory process. *See* Dan Walters, *Regulating the Regulations*, 2 CAL. LAW., Jan. 1982, at 34. For general treatments of OAL, see Cohen, *supra* note 42; C. M. Starr III, *California's New Office of Administrative Law and Other Amendments to the California APA: A Bureau to Curb Bureaucracy and Judicial Review, Too*, 32 ADMIN. L. REV. 713 (1980).

49. CAL. GOV'T CODE § 11349.1 (West Supp. 1991). According to definitions in § 11349, "necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation. "Authority" means that a provision of law permits or obligates the agency to adopt the regulation. "Clarity" means the meaning of a regulation will be easily understood by persons directly affected by it. *See* CAL. CODE REGS. tit. 1, § 16 (1990). "Consistency" means being in harmony with, not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law. "Reference" means the statute, court decision, or other provision of law which the agency implements, interprets or makes specific in the regulation. "Nonduplication" means that the regulation does not serve the same purpose as a state or federal statute or another regulation.

The most sensitive of these determinations is the judgment that a regulation does not meet the "necessity" standard, because it is made by nonspecialist OAL attorneys. The statute and regulations prohibit OAL from substituting its necessity judgment for the agency's. CAL. GOV'T CODE § 11340.1 (West Supp. 1991); CAL. CODE REGS. tit. 1, § 10(a) (1990). Yet many observers believe that such substitution does occur. *See* Commentary, *The Agencies of California Speak out About the Office of Administrative Law: A Startling Survey*, CAL. REG. L. REP., Fall 1988, at 8 (reporting intense agency dissatisfaction with OAL); Cohen, *supra* note 42 at 266–77 (criticizing OAL's use of "necessity" criterion); Walters, *supra* note 48, at 35. Any evaluation of whether OAL in fact substitutes its judgment for the agency's is beyond the scope of this article. However, the perception that such substitution occurs is widespread.

50. Note that unlike review at the federal level by OMB under Exec. Order No. 12,291, 3 C.F.R. § 127 (1981 Comp.), *reprinted in* 5 U.S.C. § 601 (1988), OAL reviews every rule, not just major rules.

In addition to reviewing all newly adopted regulations, OAL reviews an agency's declaration that an emergency exists and authorizes readoption of emergency regulations (in case of emergency, an agency can adopt a regulation without preadoption procedure but it must complete that entire process within 120 days after adopting the emergency rule unless

There are also provisions for a regulatory calendar, for required reports to the legislative authors of bills and to the committees that approved them, and for any legislative committee to trigger a "priority review" of any regulation.[51]

In short, the *Armistead* holding that interpretive rules must undergo notice and comment procedure looks very different when that procedure is the exceptionally rigorous one provided by existing law rather than the straightforward pre-1979 model in place when *Armistead* was decided.

D. The Legislature Targets Underground Regulations

In 1982, the legislature adopted Government Code section 11347.5(a),[52] which is well worth quoting in full:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.[53]

This section also provides that if OAL is notified of or learns of the issuance, enforcement or use of any such regulation which has not been properly adopted, it can issue a determination as to whether it is a regulation

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readopted with consent of OAL). CAL. GOV'T CODE § 11346.1(b), (d), (h), 11349.6(b) (West Supp. 1991). An agency may seek review by the Governor's office of an unfavorable OAL determination. *Id.* § 11349.5.

51. The calendar is required under CAL. GOV'T CODE § 11017.6 (West Supp. 1991), which prohibits an agency from adopting any regulation not listed in the calendar unless it is required by circumstances not reasonably anticipated when the calendar was proposed. Within six months after the effective date of a statute, an agency must send reports to the legislative author of a statute under which it needs to issue interpretations. *Id.* § 11017.5.

Moreover, an agency must initiate a "priority review" of any regulations that any standing, select, or joint committee of the legislature believes does not meet APA standards. *Id.* § 11340.15. OAL opposed enactment of this provision.

52. Chapter 61, 1982 Cal. Stat. 195. Numerous letters to the legislature state that Assembly Speaker Leo McCarthy was carrying the bill on behalf of the Prisoners' Union, apparently because of its frustration at informal rules of the Department of Corrections. *See, e.g.*, Legislative Analysis of the Department of Mental Health (April 15, 1981). All of the letters and analyses cited in this footnote are on file with the author.

Most of the letters from state agencies complain about the extra burdens, costs and delays that agencies would encounter upon subjecting their interpretations and other guidance documents to APA procedure and OAL scrutiny. *See, e.g.*, Legislative Analysis of the Department of Industrial Relations (1981). In light of these letters, it would appear that the legislature was indifferent to the costs and burdens imposed by the new law.

It is not clear whether the legislature meant to codify *Armistead* or merely to respond to the problem raised by the Prisoners' Union. However, the *Armistead* decision was called to the legislature's attention. Legislative Analysis of the Department of Finance (1981); Legislative Analysis of OAL (1981); Enrolled Bill Report of OAL (1982).

See infra text accompanying note 132 for a proposed narrow construction of § 11347.5.

53. CAL. GOV'T CODE § 11347.5(a) (West Supp. 1991).

and make its determination available to the public and the courts.[54] Note that this provision applies to *any* regulation, regardless of whether it was adopted before or after 1982 or even before *Armistead* was decided. Anyone can seek an OAL determination,[55] the determination is judicially reviewable,[56] and it can be utilized in court except in certain narrowly defined situations.[57] In practice, OAL has issued a steady stream of such determinations which, as might be expected, consistently make close calls in favor of broad coverage for the APA and narrow construction of its exceptions.[58]

To limit its caseload, OAL has created an exception to the application of the APA to nonlegislative rules.[59] If a rule states the "only legally tenable interpretation" of the law, the agency can promulgate it without following APA procedures.[60] There is some judicial support for this approach.[61] However, the "only legally tenable interpretation" approach is of limited utility in narrowing the scope of the APA since, needless to say, most legal matters worth arguing about have more than one legally tenable interpre-

54. CAL. GOV'T CODE § 11347.5(b), (c) (West Supp. 1991). The OAL determination process is described in Herbert F. Bolz & Michael McNamer, *Agency Rules and Rulemaking*, *in* 1 CALIFORNIA PUBLIC AGENCY PRACTICE § 20, at 20–33 to 20–44 (Gregory Ogden ed., 1991). I am informed that OAL originally opposed this extension of its jurisdiction and had to be prodded into action by the legislature.

55. *In re* Request for Regulatory Determination filed by the California Taxpayers' Association, 1986 OAL Determination, docket no. 85–004, at 4–6 (May 28, 1986).

56. CAL. GOV'T CODE § 11347.5(d) (West Supp. 1991).

57. The determination shall not be considered by a court or an agency in an adjudicatory proceeding if the proceeding involves the party that sought the determination, the proceeding began prior to the party's request for a determination, and at issue in the proceeding is whether the rule in question is a regulation as defined in the APA. *Id.* § 11347.5(e).

58. *See, e.g.*, *In re* Request for Regulatory Determination Filed by the Center for Public Interest Law, 1986 OAL Determination No. 5, at 9–12 (Aug. 13, 1986) (a "fee" does not come under the exception for "rates, prices, or tariffs").

59. OAL's failure itself to adopt this policy as a rule would appear to be in violation of CAL. GOV'T CODE § 11347.5 (West Supp. 1991).

60. *See, e.g.*, *In re* Request for Regulatory Determination filed by Judith Kurtz, 1989 OAL Determination No. 15 (Oct. 10, 1989):

> In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and "its application." Such an enactment is simply "administrative" in nature, rather than "quasi-judicial" or "quasi-legislative." If, however, the agency makes new law, i.e., supplements or "interprets" a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power.
>
> Fundamental to the issue of whether or not provisions contained in Directive 17 supplement or interpret the law enforced or administered by the agency, is whether or not the law involved needs such supplementation or interpretation. In a previous Determination we stated: "If a rule simply applies an *existing* constitutional, statutory, or regulatory requirement that has only *one* legally tenable 'interpretation,' that rule is not quasi-legislative in nature—no new 'law' is created." Therefore, if the requirements in law relevant to Directive 17 can reasonably be read only one way, then those same requirements, if included in Directive 17, are no more than restatements of the law. (Footnote omitted).

61. *See* Liquid Chem. Corp. v. Department of Health Servs., 227 Cal. App. 3d 1682, 1696, 279 Cal. Rptr. 103, 110 (Cal. Ct. App. 1991) (Internal memos "were merely illustrative of actual laws and regulations which had been lawfully adopted. The exhibits were not essential to the administrative law judge's finding that appellants had indeed violated the code sections with which they were charged.").

tation.[62] Moreover, this restriction does nothing to limit jurisdiction with respect to guidance documents other than interpretive material.

E. Judicial and Administrative Consideration of Underground Regulations

After *Armistead* and the enactment of section 11347.5, the California courts and OAL have decided numerous underground regulation disputes. While some cases have sought ways around *Armistead* and the statute, numerous others have invalidated nonlegislative rules because they were not adopted in accordance with APA procedures. Resolving doubts in favor of the application of the APA,[63] some of these cases and OAL determinations have gone quite far in the direction of expanding the statutory limits and narrowing the exceptions. For example, interpretations found in informal agency memoranda that were not adopted by the agency heads[64] or that were articulated in press releases[65] or in advice letters[66] have been treated as invalidly adopted underground regulations.

A particularly controversial decision is *Grier v. Kizer*,[67] which involved a regulation adopted by the Department of Health Services to guide its staff in auditing providers under the MediCal program. Since it is impracticable to audit every claim made by a specific provider, the staff instruction prescribed a statistical sampling method. However, the Department failed to adopt the sampling method as a rule under the APA. The Court of Appeal

62. For a typically cautious treatment of this exception, see *In re* Request for Regulatory Determination filed by Alliance of Trades and Maintenance, 1991 OAL Determination No. 1, at 9–13 (Jan. 9, 1991). OAL found that some parts of the regulation were mere restatements of existing law but that one portion went beyond it.

63. Grier v. Kizer, 219 Cal. App. 3d 422, 438, 268 Cal. Rptr. 244, 253 (Cal. Ct. App. 1990).

64. Goleta Valley Community Hosp. v. Department of Health Servs., 149 Cal. App. 3d 1124, 1129, 197 Cal. Rptr. 294, 297–98 (Cal. Ct. App. 1983) (memo from staff attorney to chief hearing officer).

65. Planned Parenthood Affiliates v. Swoap, 121 Cal. App. 3d 120, 219 Cal. Rptr. 664, 673 n.11 (Cal. Ct. App. 1985).

66. Winzler & Kelly v. Department of Indus. Relations, 174 Cal. Rptr. 744 (Cal. Ct. App. 1981) (employer group requested guidance, agency responded in letter to one employer); *In re* Request for Regulatory Determination filed by Stephen Arian, 1989 OAL Determination No. 12 (July 25, 1989) (pattern of similar letters responding to requests for advice shows adoption of regulation). This authority seems to defy CAL. GOV'T CODE § 11343(a)(3) (West Supp. 1991), which provides an exemption from filing (and thus from other preadoption procedures) for a regulation that "is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." OAL interprets this section so that if the same letter would be sent to people in different parts of the state, § 11343(a)(3) does not apply.

67. 219 Cal. App. 3d 422, 268 Cal. Rptr. 244 (Cal. Ct. App. 1990). *Grier* was followed by Union of American Physicians and Dentists v. Kizer, 223 Cal. App. 3d 490, 272 Cal. Rptr. 886 (Cal. Ct. App. 1990). *But see* City of San Joaquin v. State Bd. of Equalization, 9 Cal. App. 3d 365, 88 Cal. Rptr. 12 (Cal. Ct. App. 1970) (Board's statistical accounting technique to allocate tax revenues between jurisdictions is not a regulation within the meaning of the APA). Under federal law, a ruling that implemented a system of sampling medical provider claims was upheld as an interpretive rule. Chaves County Home Health Serv. v. Sullivan, 931 F.2d 914, 923 (D.C. Cir. 1991).

held that the staff instruction was a regulation under the APA[68] and that it did not fall under the internal management exception. Consequently, the sampling technique was invalid, and the state could not collect from the doctor the $654,592 in overcharges that were discovered in the course of the audit![69]

A similarly dramatic remedy was apparently employed in *Woosley v. State*.[70] In that case, several agencies agreed on an interpretation of the use tax law for the purpose of valuing cars purchased outside the state, but they failed to adopt it under the APA. The court rejected the interpretation on the merits. It also apparently agreed with the trial court that the interpretation was *independently* invalid because of the failure to adopt it in accordance with the APA—or at least so the dissenter read the majority opinion.[71] Thus *Woosley* could be read for the startling proposition that a court can invalidate a substantively *correct* interpretation, and any action based thereon, because the agency failed to use the proper procedure in adopting it. A

68. OAL had issued a determination that the regulation in question was invalidly adopted. Because the determination had been requested by someone other than Dr. Grier, the court was not precluded from considering it in the *Grier* case. *See* CAL. GOV'T CODE § 11347.5(e) (West Supp. 1991). The court in *Grier* gave deference to OAL's determination that the rule was invalid but no deference to Department's view that the rule was valid. 219 Cal. App. 3d at 435, 268 Cal. Rptr. at 251–52. In addition, the court noted that the agency acquiesced in OAL's determination by formally adopting a regulation providing for statistical extrapolation. This "acquiescence" tended to support the correctness of OAL's determination! 268 Cal. Rptr. at 254–55.

69. The court concluded:

> The Department's failure to comply with the APA renders the method invalid and unenforceable. Therefore, we do not reach the statistical validity of the method, whether it was correctly employed, or any other contentions. We affirm the judgment barring the Department from making any claim against Grier based on the sampling and extrapolation method it utilized in the audit.

219 Cal. App. 3d at 470, 268 Cal. at 255 (footnote omitted).

In a subsequent case, the court held that the state must refund amounts paid to the state by *any* providers who sue for refunds if their audits had previously been conducted under the invalidly adopted statistical techniques, whether or not they had previously protested the methods. Union of Am. Physicians & Dentists v. Kizer, 223 Cal. App. 3d 490, 502–06, 272 Cal. Rptr. 886, 893–95 (Cal. Ct. App. 1990). The state's refund obligation under this decision must be very large. The latter case also invalidated audits based on the Department's bulletins that interpreted (and probably altered) its own regulations. 272 Cal. Rptr. at 891–93.

See also Stoneham v. Rushen, 137 Cal. App. 3d 729, 188 Cal. Rptr. 130 (Cal. Ct. App. 1982) (prohibiting classification of prisoners under administrative bulletin not adopted as regulation).

The remedy of invalidating agency action based upon an incorrectly adopted underground rule is criticized *infra* in text accompanying notes 150–52.

70. 227 Cal. App. 3d 1053, 266 Cal. Rptr. 385 (Cal. Ct. App. 1990), *review granted*, 791 P.2d 337, 269 Cal. Rptr. 767 (Cal. 1990), *review modified*, 807 P.2d 1006, 279 Cal. Rptr. 777 (Cal. 1991). *See also* Union of Am. Physicians & Dentists v. Kizer, 223 Cal. App. 3d 490, 272 Cal. Rptr. 886 (Cal. Ct. App. 1990); Pacific Southwest Airlines v. State Bd. of Equalization, 73 Cal. App. 3d 32, 140 Cal. Rptr. 543 (Cal. Ct. App. 1977).

71. According to the dissent, if the interpretation was improperly adopted, the court should not defer to it. However, the procedural defect should not, in itself, render an otherwise valid interpretation invalid. 227 Cal. App. 3d 1053, 1088–89, 266 Cal. Rptr. 385, 406–07 (Cal. Ct. App. 1990) (Ashby, J., dissenting).

hearing has been granted by the California Supreme Court; because *Woosley* is a class action, large tax refunds are at stake.[72]

III. EFFECTS ON AGENCIES OF REQUIRING APA COMPLIANCE FOR ADOPTION OF UNDERGROUND RULES

I have sought to determine the practical effects of the California law of underground regulations on the actual conduct of agency business in California. The research methodology consisted of conducting interviews (mostly by phone) with a substantial number of present and former staff members at California agencies, including OAL, and with numerous private practitioners.[73]

The requirement that nonlegislative rules be subjected to elaborate preadoption procedure clearly has had some beneficial effects. Agencies can suffer from a narrow mind-set or lack appropriate information. Undoubtedly, there are many instances in which the process of public input persuaded an agency to make desirable changes in its nonlegislative rules and many other instances in which such input would have been useful if it had occurred. In addition, there are no doubt numerous cases in which OAL review served to improve the quality of such rules or to preclude adoption of unlawful or unnecessary ones. It seems clear that the quality of agency staff work devoted to rulemaking has improved since 1979.[74] OAL staff members cite examples of the good effects of its regulatory program, and a few staff members at other agencies echo this praise.

Private practitioners in the field of California administrative law warmly praise the existing law, stating that their clients are often harmed by unsuspected or perhaps invalid underground regulations; the existing law gives

72. Since the Court of Appeal found the interpretation substantively invalid, the decisions of the lower courts can be affirmed without dealing with the underground regulation issue.

73. I conducted interviews with present and former staff of the Office of Administrative Law, Attorney General, Department of Health Services, Health and Welfare Agency, Department of Rehabilitation, Department of Motor Vehicles, Department of Developmental Services, Department of Corrections, Department of Social Services, Air Resources Board, Coastal Commission, Superintendent of Banks, Employment Development Administration, State Personnel Board, Department of Consumer Affairs, Department of Insurance, Caltrans, Fair Political Practices Commission, Department of Education, and State Board of Equalization. Notes of all interviews are on file with the author. I promised anonymity to all persons interviewed, and this promise prevents my giving specific examples of the sorts of behavior to be discussed in the text. However, the persons whom I interviewed provided a wealth of specific examples.

This methodology could be criticized because it relies on the opinions of agency staff members who are often hostile to OAL scrutiny of their rules. However, I believe that the large number of agency people interviewed, not all of whom were hostile to OAL, and the consistency and detail of their accounts, should protect against errors resulting from the bias of individuals. In addition, I interviewed OAL and private sector professionals (some but not all of whom had experience in agencies before moving to the private sector) to get the nonagency point of view.

74. I was told that the drafting of rules was once entrusted to nonlawyers or paralegals. No more.

them a convenient remedy to counteract these regulations. Nevertheless, my data has convinced me that on balance the effects of the existing law are negative. The balance of this section summarizes this data.

A. Unwarranted Costs and Delays

Some agencies seek in good faith to comply with the existing California law on underground regulations. Such agencies adopt every generally applicable interpretation,[75] guideline, manual supplement or the like as a regulation under the APA and submit them to OAL for its scrutiny. Such fastidious APA compliance entails heavy costs.

Compliance with APA procedure ensures significant delay in adopting a rule. Ideally, a nonlegislative rule might be published in four months; this is the absolute minimum for a simple and noncontroversial regulation that is rushed to adoption.[76] However, it is not uncommon for the process to consume several years where the regulation is controversial, the agency must perform an extensive study to generate documentation or expert testimony to satisfy the "necessity" requirement, the agency makes significant changes in proposed rules and thus must repropose them, or it encounters rejection of the rule at the hands of OAL.

Such delays pose a serious problem because an agency cannot furnish authoritative guidance until the entire process is concluded. Yet, by the time a rule or guideline is finally adopted, circumstances may change and the rule may be obsolete. Even more significant, an agency is often required to respond quickly to demands for guidance—for example, from a new court decision or a new statute or an emerging problem. California has no "good cause" exemption like that in federal law,[77] and the provision for "emergency regulations" in California is often inadequate.[78]

In addition, agencies incur heavy budgetary cost in complying with rulemaking procedure. Large quantities of staff time are inevitably consumed

75. Other than one that states the only "legally tenable interpretation." Under OAL practice, if there is no other legally tenable interpretation, an agency need not adopt the document as a rule. *See supra* text accompanying notes 59–62.

76. Most agency staff indicated that six months was a more realistic estimate of the minimum time required to adopt a regulation.

77. 5 U.S.C § 553(b)(B), (d)(3) (1988).

78. An emergency requires a finding that the rule is necessary for the immediate preservation of the public peace, health and safety or general welfare. CAL. GOV'T CODE § 11349.6(b) (West 1980). Moreover, OAL can disapprove a finding of emergency and the use of the emergency exception is judicially reviewable. OAL and judicial enforcement of the narrowly stated emergency provision has been quite strict. Stoneham v. Rushen, 137 Cal. App. 3d 130, 188 Cal. Rptr. 130 (Cal. Ct. App. 1982) (OAL disapproval of emergency regulation for classifying prisoners); Poschman v. Dumke, 31 Cal. App. 3d 932, 107 Cal. Rptr. 596 (Cal. Ct. App. 1973) (crisis required). In addition, the emergency provision is *not* an exception to APA rulemaking procedure; it simply allows the rule to be adopted immediately. The agency must complete the entire rulemaking process within 120 days or the emergency regulation lapses. CAL. GOV'T CODE § 11346.1(e) (West 1980). Yet the 120-day period is far too short a period in which to complete the rigorous rulemaking process. This problem is often solved in practice by OAL's consent to readoption of the emergency regulation until the process can be completed. CAL. GOV'T CODE § 11346.1(h) (West 1980).

in building a rulemaking file that is letter-perfect. Agencies consider a perfect file essential to obtaining OAL approval, but producing one can be an exacting task.[79] One particularly costly element is the statutory requirement of a response to *every part* of *every* public comment. Of course, this obligation encourages opponents of a proposed rule to file numerous and voluminous comments requiring the expenditure of large resources just to analyze and respond to them.[80] In addition, OAL frequently rejects rules because, in the reviewer's opinion, they are not clearly written or the reviewer disagrees with the agency's determination that the rule is authorized by statute. Many of the present and former agency staff members I interviewed complained, based on their personal experience, that OAL staff go too far in nit-picking rules in applying the clarity and authority criteria.

Most significantly, OAL reviewers reject rules if they determine that the necessity of any part of the rule is not established by substantial evidence in the rulemaking record. A claim of agency expertise will not suffice to meet this standard.[81] Often the OAL reviewers are inexperienced generalists who feel free to second-guess the work of experienced specialists as to the adequacy of the evidence in the record to establish necessity.[82]

Well-trained and experienced agency staff (or costly outside consultants) can usually navigate the shoals of the rulemaking process without errors, can draft a rule that is sufficiently clear, and can construct a record that satisfies OAL reviewers that the necessity standard has been met. Unfortunately, the tasks necessarily must often be assigned to inexperienced staff who simply cannot (despite OAL's best efforts in conducting training sessions) perform them flawlessly. As a result, many regulations bounce back and forth between the agency and OAL with large expenditures of staff resources on each round. From the agency's point of view, it is not worth a futile appeal to the governor or a probably futile attempt at judicial review; it is easier to just redraft the rule and try again. There are also examples of rules that never survive the process at all; after experiencing OAL rejection, the agency simply drops the rule in frustration.

California agencies have for several years been experiencing extremely lean budgets and have been required to make repeated cuts in legal, managerial, and clerical staff. As a result, it has become increasingly difficult to allocate precious staff time (or to hire outside consultants) to negotiate the APA obstacle course.

79. One agency cited a recent example: to adopt a set of relatively brief regulations took 1,000 hours of staff time (6.4 person-months) and roughly $30,000 in direct cost of staff working on the rule. This figure does not count indirect costs.

80. *See supra* note 42.

81. *See* CAL. CODE REGS. tit. 1, § 10(b)(2) (1990) (requiring that necessity be established by supporting facts, studies, expert opinion, or other information).

82. This is the opinion of many agency staff members I interviewed and of those who responded to the questionnaire discussed *supra* note 49. The statute and regulations preclude OAL from substituting its judgment for that of the agency. *Id.* Whether the perception is in fact valid is beyond the scope of this article.

While this costly procedure may be justifiable in the case of the adoption of legislative rules, it is difficult to justify the expenditure of extremely scarce resources to propose and adopt nonlegislative rules. In comparison, the benefits of APA procedure seem modest; by definition, these are not rules that anybody has to follow. Many of them are trivial and, as a result, there is often little public interest in commenting on them. Of course, *some* nonlegislative rules are controversial, and the notice and comment process is *sometimes* meaningful, but this is not often true.

Indeed, it can be questioned whether OAL's use of its own limited staff time on reviewing (or writing determinations concerning) nonlegislative rules is justifiable. Like all other state agencies, OAL is experiencing extreme budgetary stringency. Yet an OAL determination that a disputed underground rule should have been adopted under the APA is a most substantial project and the costs of producing such a determination are quite significant. OAL conducts a notice and comment procedure of its own before issuing a determination, and many determinations run forty single-spaced typed pages with 50 to 100 footnotes. They are very carefully researched and written. It would seem that legislative rules—binding norms that require people to do or not do something—are more important than underground rules. OAL might make better use of its own scarce resources by concentrating on the review of legislative rules.[83]

B. Nonadoption of Rules

As a result of the costs, delays, and general aggravation attendant upon complying with the APA, agencies often adopt no rules—legislative or nonlegislative. Similarly, they frequently decide not to revise existing rules, manuals, bulletins, and the like even when these are outdated. Instead, agency staff members make a conscious decision to get by in some other way than issuing a rule.

For example, some agencies consciously employ case-by-case adjudication rather than rulemaking to announce new interpretations or policies. Even more frequently, they respond to requests for advice by providing specific (rather than generalized) responses.[84] They transmit directions to the staff through informal methods such as oral training sessions. Especially with

83. I am informed that OAL staff cuts have caused a significant backlog of unprocessed requests for determination of whether underground regulations have been validly adopted. OAL is wisely deploying its shrinking resources in favor of reviewing proposed rules rather than issuing such determinations.

84. There is always the possibility that a pattern of similar advice letters would establish the existence of an underground regulation. *See* Goleta Valley Community Hosp. v. State Dep't of Health Servs., 149 Cal. App. 3d 1124, 197 Cal. Rptr. 294 (Cal. Ct. App. 1983) (internal staff memo reflected in individualized advice letters to public is invalid underground regulation); Winzler & Kelly v. Department of Indus. Relations, 121 Cal. App. 3d 120, 174 Cal. Rptr. 744 (Cal. Ct. App. 1981) (agency's letter to individual firm, responding to request by employer group, that surveyors are covered by prevailing wage law was a regulation); OAL Determination No. 12, *supra* note 66, at 405–06 (pattern of similar letters to persons requesting advice is a regulation).

respect to nonlegislative rules, it is perfectly possible for an agency to muddle through without adopting any at all, thus shifting the burden of uncertainty onto the public.[85]

If the agencies in fact fail to adopt nonlegislative rules that they otherwise would adopt, this outcome is contrary to the public interest. There cannot be too many nonlegislative rules. The legislature thought there were too many regulations and so established OAL to diminish their quantity (as well as to improve their quality).[86] While this premise is surely debatable when applied to *legislative* regulations, it would be surprising if people believed that there are too many *nonlegislative* regulations. Isn't the public better off knowing how an agency interprets the law? Isn't it better to get this information in the form of generally applicable interpretations rather than unpredictable and inaccessible adjudicatory decisions or individual advice letters? Shouldn't an agency take steps to assure that its staff all enforce the law or exercise discretion in the same way?

The more an agency tells the public and its staff how it intends to interpret or apply the law, the better. Similarly, the more the agency goes public with guidelines that constrain its statutory discretion, the better. The regulated public has an intense interest in obtaining reliable, generalized guidance from regulators. The staff of an agency also needs to know how the agency thinks the law should be interpreted and how discretion should be exercised, lest the law be inconsistently applied. My interviews yielded numerous accounts of situations in which field staff came up with inconsistent approaches to problems because the agency could not give them up-to-date guidance.

C. Resort to Legislation

Remarkably, agencies often find it easier and quicker to get legislation passed than to comply with rulemaking procedures.[87] Other agencies have flexed their political muscles and obtained legislative exemptions from the APA for their rulemaking.[88]

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85. See discussion of the theoretical model in Part IV.

86. CAL. GOV'T CODE § 11340.1 (West 1980). "It is the intent of the legislature that the purpose of such review shall be to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted." *Id.*

87. *See* Commentary, *The Agencies of California Speak out About the Office of Administrative Law: A Startling Survey*, CAL. REG. L. REP., Fall 1988, at 8, 10. Acccording to this survey, 56.7 percent of agencies responding have sought statutory amendments in lieu of regulatory changes because of a desire to avoid the rulemaking process. Of agencies that have sought legislation, 90.4 percent listed frustration with OAL as their reason for avoiding the rulemaking process.

88. *See* Bolz & McNamer, *supra* note 54, at 20–28 to 20–33; Brewer & McNamer, *supra* note 30, at 21–54 to 21–58. The exceptions for the Public Utilities Commission and Workers Compensation Appeals Board are longstanding. CAL. GOV'T CODE § 11351 (West 1980); 1947 Cal. Stat. 1425. So are the exceptions for rates, prices or tariffs and for forms. CAL. GOV'T CODE §§ 11343(a)(1), 11346.1(a) (West 1980); 1941 Cal. Stat. 628 (rates, prices, or tariffs); 1957 Cal. Stat. 916 (forms). More recent exemptions include those for "legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. . . ." CAL.

Neither approach is optimal. A statute that exempts all of an agency's rulemaking from the APA is undesirable, since it will allow important legislative regulations to escape pre-adoption public participation. In addition, placing into a statute what should be in a regulation is undesirable, since the highly overburdened legislature[89] should not be troubled with relatively trivial matters. Moreover, legislation, once enacted, resists change; if the legislature is out of session or busy with other matters, it may be difficult for an agency to adjust to changing circumstances. Finally, legislatures are subject to pressures of all sorts; an agency can easily lose control over the process of adopting or amending legislation. For example, an author might accept amendments at the last minute, thus thwarting agency intentions. Yet the agency could, through rulemaking, have designed a product that precisely suited its needs and was less susceptible to special interest influence.

D. Skirting the Law

Agencies have developed techniques of questionable validity which, they hope, enable them to provide generalized guidance to the public without running afoul of the APA. For example, agencies often state policies in voluntary form. Thus, in their view, if the rule is stated in the form "it is suggested that . . ." or the rule uses verbs like "may" instead of "must," the resulting product is not a "rule." Of course, these policies may be less effective in actually affecting the behavior of regulated parties than if they were stated in mandatory form.

Similarly, agencies often take the position that their interpretations are mere descriptions or reminders of the law or regulations and thus qualify under OAL's "only legally tenable" test.[90] This approach probably results in a product that obscures the legal issues at stake because it induces the staff member who writes the interpretation to pretend that there are no legal issues to resolve.

Another maneuver is to issue a notice that announces the general nature of a regulation that the agency plans to propose in the future. Somehow, however, the staff never quite gets around to actually proposing the regulation. Meanwhile, the constituencies with which the agency deals are put on notice of the agency's view.

By the same token, agencies may provide guidance in a form that is sufficiently flexible that it might not be considered a rule. For example, a guid-

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GOV'T CODE § 11342(b) (West 1980). Drafters of initiative measures have exempted their regulatory schemes from the APA. CAL. GOV'T CODE § 8880.26 (West Supp. 1991) (lottery); CAL. HEALTH & SAFETY CODE § 25249.8(e) (West Supp. 1991) (toxic chemicals specified in Proposition 65).

89. The California legislature recently incurred devastating staff reductions as the result of Proposition 140 which cut its operating budget 40 percent. The passage of Proposition 140 makes it urgent that the legislature's burden be lightened, not loaded down with every minor bit of regulatory business that an agency wishes to adopt without going through rulemaking procedure.

90. *See supra* text accompanying notes 59–62.

ance document might state that a particular technology would be an acceptable method of complying with an existing statute or regulation that requires the reduction of a particular form of discharge into the air or water. However, if dischargers can suggest other technologies that would be equally effective, those would be acceptable also. Thus the agency can claim that it has not mandated any particular technology.

E. Ignoring the Law

Finally, many agencies simply gamble on not getting caught. They are fully aware that their new interpretations, instructions, and guidelines, and vast numbers of old ones, are probably invalid and unenforceable. They are well aware that their manuals are loaded with interpretations, instructions to staff, tolerance levels, and the like, many of them underground regulations adopted without compliance with the APA.

The magnitude of the problem is staggering. In a report to the legislature seeking additional staff, OAL "conservatively" estimated that between 100,000 to 200,000 regulations described in section 11347.5 were currently being enforced by state agencies.[91] In its report, OAL estimated that it would require 101 staff hours to process each request for a determination; this suggests that if the problem of underground regulations were taken seriously, OAL would need hundreds of staff members to make a dent in the problem. However, the budget request asked only for two and one-half staff positions to process seventy-five determinations per year. At that rate, it would take somewhere between one thousand and three thousand years to correct the problem, assuming no new underground regulations are adopted in the meantime. Under these rather dramatic circumstances, OAL's only realistic strategy is to allocate limited resources to its underground regulation jurisdiction, await complaints, and issue determinations to the offending agency, but otherwise make no serious effort to root out the offending rules.[92]

Agencies lack the resources to comb through their manuals and adopt all of the regulations therein under the APA. Lack of resources and an urgent need to convey guidance prevent them from adopting new regulations under the APA. As a result, they cross their fingers and hope for the best. It is a rather unfortunate situation when state agencies are compelled to flout administrative law on a massive scale, hoping that they will not be struck by lightning.

In addition, the strategy of playing the audit lottery has some significant disadvantages. It is no small matter for an agency to suffer a negative OAL determination. In some circumstances, the determination can be used against

91. *Report to the Legislature on the Implementation of Government Code Section 11347.5* at 2 (1985). *See also Agency's Review of Regulations is Under Attack*, L.A. DAILY J., Nov. 30, 1984, at 1 (OAL director estimates there are more than 200,000 underground regulations).

92. OAL initially resisted the expansion of its jurisdiction embodied in § 11347.5 and only began enforcing it after being prodded by the legislature.

the agency in court[93] and in all cases, the offending agency is publicly branded as a scofflaw. This can have negative political consequences.

If cases like *Woosley* and *Grier* are followed, agencies take a serious risk in ignoring the rulemaking requirements since the result may be the invalidity of their actions. In *Grier*, for example, an agency was unable to collect overcharges from a MediCal provider.[94] This result could suggest that a great many state enforcement efforts are in jeopardy because law enforcement personnel make use of instructions to staff that have not been adopted as rules. Moreover, agencies quite justifiably fear that they are fair game for attorneys who will sue them and claim attorneys' fees if they win.[95]

IV. A MODEL OF AGENCY BEHAVIOR

This section suggests a model that explains why an agency decisionmaker might decide to forego nonlegislative rulemaking when faced by high costs for adopting such rules. All rational beings seek to function efficiently by maximizing utility. An agency decisionmaker is responsible for efficient operation of a regulatory program. Given a fixed budget, numerous political and legal constraints, and competing uses for scarce resources,[96] a decisionmaker must constantly evaluate the net marginal costs and benefits of

93. CAL. GOV'T CODE § 11347.5(e) (West Supp. 1991) precludes such use only in one narrowly defined circumstance (where the party to litigation sought the determination after the litigation began). In other circumstances, the determination can be used. In *Grier v. Kizer*, discussed *supra* text accompanying notes 67–69, the court deferred to an OAL determination that had been requested by a different Medi-Cal provider.

94. 219 Cal. App. 3d 422, 268 Cal. Rptr. 244 (Cal. Ct. App. 1990). *See supra* text accompanying notes 67–69. In *Union of American Physicians & Dentists v. Kizer*, discussed *supra* note 69, the court followed up on *Grier* by allowing all providers audited under the invalid technique to obtain a refund of any overcharges they paid to the state.

95. For example, *Woosley* is a class action brought by an attorney who claims that he overpaid use tax on a car purchased out of state. The potential for a large fee award is substantial in such a case, and the potential for litigation is magnified by the relaxation of standing rules. *See, e.g.*, American Friends Serv. Comm. v. Procunier, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (Cal. Ct. App. 1973) (attack on improperly adopted regulations by prisoners' rights organization—any citizen can seek writ of mandate in case of public right alleging that an agency is not complying with the law). Taxpayer suits are also a possibility. *See* Steven Mains, Note, *California Taxpayers' Suits: Suing State Officers Under Section 526a of the Code of Civil Procedure*, 28 HASTINGS L.J. 477 (1976). However, in the ordinary case seeking declaratory relief based on invalidity of a regulation, a plaintiff must be an "interested party." CAL. GOV'T CODE § 11350(a) (West 1980).

A court may award attorneys' fees to a successful party in any action that resulted in the enforcement of "an important right affecting the public interest" if a significant benefit has been conferred on the general public or a large class of persons, the financial burden of private enforcement is such as to make the award appropriate, and such fees should not in the interest of justice be paid out of any recovery. CAL. CIV. PROC. CODE § 1021.5 (West 1980). *But see* Johnston v. Department of Personnel Admin., 191 Cal. App. 3d 1218, 236 Cal. Rptr. 853 (Cal. Ct. App. 1987) (denying fees because benefit not conferred on large class). Other provisions grant attorney fees up to $7,500 in cases of arbitrary agency action. CAL. GOV'T CODE § 800 (West 1980); CAL. CIV. PROC. CODE § 1028.5 (West Supp. 1991).

96. *See* JAMES Q. WILSON, BUREAUCRACY 113–36 (1989) for an account of why administration is habitually underfunded. As Wilson analyzes the problem, a scarcity of resources for administration, compared to the tasks assigned to an agency, is virtually inevitable.

a proposed course of action, in order to maximize the agency's output at least cost.[97] Thus, in order to undertake a new project, an agency manager must conclude that the net marginal benefits from completing the task outweigh the net marginal bureaucratic costs of doing so, including foregone opportunities.

In other words, there must exist a supply curve of bureaucratic outputs. If only one type of output can be produced, increasing the net costs of producing that output will diminish the quantity supplied. If the organization can choose between several kinds of outputs or different uses of its resources, it is uncertain what will happen if the cost of taking one such action is increased. Certainly, in that situation, the agency must reassess its priorities. It might decide to produce the same number of units of the more costly output and produce less of something else or everything else; or it might cut its output of the more costly product and produce more of some other product; or it might produce fewer units of the more costly output while keeping the proportion of budget allocated to it the same.

Numerous accounts of agency behavior confirm that agency managers who can choose between different targets of law enforcement or different bureaucratic products respond to increases in the costs or difficulty of pursuing one of them. For example, Wilson explains OSHA's preoccupation with safety risks as opposed to health risks (even though the latter seem more serious) by pointing to the relative bureaucratic ease of describing and preventing safety risks.[98] Mashaw and Harfst, in their brilliant study of automobile safety regulation, seek to explain NHTSA's shift in favor of product recalls instead of adopting prescriptive safety regulations. The explanation, they find, is traceable to judicially imposed difficulties of adopting regulations as opposed to relatively simple and low-cost adjudicatory recalls.[99] According to Pierce, the Federal Energy Regulatory

97. *See* ANTHONY DOWNS, INSIDE BUREAUCRACY 196 (1967) (the larger the costs of making a bureaucratic change, the greater will be the organization's resistance to it); HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 122, 172–97 (1976); Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305 (1972). Unlike others who have modelled bureaucratic behavior, I make no assumption about the ultimate objectives of agency policymakers and staff. This analysis of how an agency deploys its resources should hold regardless of whether agency heads and staff are trying to promote the public interest or instead are seeking other objectives, such as maximizing budget or expanding their own job opportunities. Similarly, the same analysis holds whether one assumes that bureaucratic behavior is based on an optimizing or a muddling-through ("satisficing") approach or whether one assumes that decisionmakers use objective or subjective criteria.

98. WILSON, *supra* note 96, at 42. Wilson's book contains numerous other examples: welfare workers are most helpful to cooperative clients—i.e. those that exact the lowest costs in energy and bother. *Id.* at 51–53. Agencies seldom try to discharge bad employees because of the huge costs and delays in doing so even though the agencies usually win when the employees appeal. *Id.* at 145–46. More rulemaking procedural complexity means fewer OSHA rules. *Id.* at 282–84. A judicial order to implement a policy at all costs results in cutbacks of implementation of other policies that may well be much more important. *Id.* at 288–90. Various controls designed to prevent waste in military spending cost vastly more than any amounts they actually save. *Id.* at 323–25.

99. JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

Commission has responded to federal cases overturning its rules on the basis of inadequate consideration of alternatives by using adjudication instead. Yet rulemaking is far superior to adjudication in dealing with the critical problems of energy production.[100]

What then is the effect of increasing the bureaucratic costs of producing nonlegislative rules?[101] The answer depends on an unknowable premise—the elasticity of the supply curve for this particular output. While the slope of the supply curve for nonlegislative rules no doubt varies from one agency to another, it seems likely that the supply function for such rules is quite elastic—meaning that supply is relatively sensitive to increases in bureaucratic production costs.

The reason for this assumption is that nonlegislative rules are different from other bureaucratic outputs in one critical respect: normally the regulatory program can function without them.[102] Legislative rules are usually necessary to set a regulatory program in motion, particularly if the agency's statute is not self-executing. Similarly, an agency must adjudicate the cases on its docket and respond to complaints. But nonlegislative rules can be dispensed with because an agency is not usually required to issue them. Their primary function is to diminish uncertainty, but the agency is not required to diminish uncertainty.

The costs of uncertainty are largely borne by the members of the public, not by agency officials. For that reason, public uncertainty is an externality that agency utility-maximizers need not take into account. Thus an agency may well choose to muddle through without producing any guidance documents, or it may find some informal way to communicate the information.

Of course, nonlegislative rules may well affect private behavior in ways that the agency favors. In such cases, guidance documents may decrease the number of instances of law violation and correspondingly decrease the number of disputes between the agency and the private sector that the

100. Richard J. Pierce, Jr., *Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991). Pierce generalized this argument in an excellent article that shows that hard look judicial review (combined with politically polarized courts) has driven many federal agencies to resort to adjudication in favor of rulemaking. Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300.

101. The costs of attaining greater precision in law, whether through legislative rules or through agency interpretation or guidance documents, are significant and must necessarily be balanced against the benefits of doing so. In addition to costs imposed by mandatory legal procedure, the agency must incur substantial costs in drafting the product and in gaining internal consensus. *See* DOWNS, *supra* note 97, at 178–82; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 71–79 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267 (1974); Daniel J. Gifford, *Discretionary Decisionmaking in the Regulatory Agencies*, 57 S. CAL. L. REV. 101, 125–35 (1983).

102. Wilson points out the many political constraints on agency managers. WILSON, *supra* note 96, at 113–36. Since various forms of agency behavior may be politically mandated, those that are not mandated become obvious targets for economy moves. Furnishing internal guidance to staff or external guidance to regulated parties is seldom an agency function that is politically mandated. *Id.* at 135–36.

agency must resolve. Thus, the agency may derive significant marginal benefit from the reduction of private uncertainty. In addition, guidelines may well make staff more efficient in carrying out its chores, thus allowing the agency to deliver more regulation or benefits per dollar of budgetary input. Nevertheless, the likely reduction in violations of the law or the improvement in staff efficiency are hard to measure. These are longer-term benefits, while the bureaucratic costs of reducing uncertainty through the production of nonlegislative rules must be borne immediately.

In short, since the production of nonlegislative rules can usually be deferred until additional resources become available, such rules must often be losers in the unending internal struggle for resources. Thus, the existence of an exacting and costly legal regime like California notice and comment rulemaking and OAL scrutiny should result in a sharp diminution (perhaps to zero) of new interpretive or guidance material. By the same token, these procedural constraints are likely to generate evasion strategies so that the agency can produce the desired output of such material without incurring the costs of doing so. If the state's monitoring system is weak so that an agency can usually issue and enforce nonlegislative rules without being compelled to pay the costs, even conscientious agency managers will be strongly tempted to ignore the constraints and avoid the costs.

This model would predict what I believe has in fact occurred in California. As discussed in Part III, many agencies have stopped issuing nonlegislative regulations (and, in some cases, legislative regulations as well).[103] Others continue to issue nonlegislative rules and to apply old ones, but ignore the APA and hope for the best. Still others find lower-cost methods of achieving the goals such as seeking legislation, using informal or individualized methods of communication, or devising methods that might successfully skirt the law.

V. COMING TO GRIPS WITH THE PROBLEM

A. Legislative Solutions

I believe the legislature should act to repair the damage that the *Armistead* case and its legislative sequel, section 11347.5, have done to California administration. Several legislative models are at hand:

i. The federal statute, which imposes no procedural requirements on the adoption of interpretive rules, policy statements, or procedural rules, and has a broadly applicable good-cause exception;

ii. The 1981 Model APA, which contains carefully limited exceptions;

iii. Several recently adopted state statutes, of which the Washington statute is the most carefully considered.

103. For example, one person I interviewed had in mind a new procedure he would like to implement to solve a particular problem his agency occasionally confronts. Because of the bureaucratic costs of adopting it, however, it is far down his priority list. If he could get it adopted quickly and simply, he would do it tomorrow.

1. *Federal APA*

In 1946, Congress decided not to impose rulemaking process on the adoption of interpretive rules, policy statements, and procedural rules. In previous articles, I have contended that this was a wise judgment.[104] The costs of subjecting nonlegislative rules to notice and comment procedure of any kind—much less the high-tech California variety—outweigh the benefits. At least, I believe this is so for interpretive rules and procedural rules; I feel less certain with respect to policy statements.[105]

Under the federal model, generally applicable interpretations and policies must be published.[106] Even if California decides to follow the federal model by dispensing with rulemaking procedure for nonlegislative rules, it would be imperative to maintain the requirement that all generally applicable nonlegislative rules be made accessible in some convenient manner (not necessarily by publication in the *California Code of Regulations*).[107]

There are disadvantages to the federal model. It fails to define its categories, so that it is often difficult to decide whether a particular rule qualifies for exemption. There have been many cases on this issue, and courts have often complained that the categorical exemptions present difficult characterization issues. Nevertheless, the federal law has stabilized; if an agency consistently describes an interpretation as an interpretive rule, and it has no binding legal effect on anyone, the agency's label is respected, regardless of the rule's practical impact.[108] If an agency adopts a discretion-confining rule, it qualifies as a policy statement so long as it is tentative, not definitive.[109] A rule is procedural if it concerns the way the agency goes about its work and it does not substantially alter the legal rights of the public.[110]

In close cases, there will always be difficulty in applying these categorical exceptions to the disorderly products produced by different sorts of agencies, but so it is with many legal standards. However, most agency rules

104. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 409 [hereinafter Asimow, *Nonlegislative Rulemaking*]; Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520 (1977). *See also* Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW 343 (1991). [hereinafter Asimow, *Temporary Tax Regulations*].

105. *See infra* note 109.

106. 5 U.S.C. § 552(a)(1)(D) (1988).

107. In Washington, interpretive rules and policy statements must be made available to the public but not published in the Administrative Code. WASH REV. CODE § 34.05.220(2) (West 1990).

108. Asimow, *Nonlegislative Rulemaking*, *supra* note 104, at 393–97; Asimow, *Temporary Tax Regulations*, *supra* note 104, at 350–57.

109. Asimow, *Nonlegislative Rulemaking*, *supra* note 104, at 390–92. I find the policy statement exception the most troubling of the three categorical exceptions in the federal act. The tentative-definitive test is difficult to apply and probably unsound. It turns too much on fortuitously chosen words and uncertain evidence of how the staff actually applies the policy. Besides, low-level agency staff probably apply a policy rigidly whether it is stated in tentative or definitive terms.

110. *See* United States Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984).

claiming exemption will not present close cases. Surely, some unpredictability and fuzziness around the edges is preferable to the clearly negative consequences of existing California law described in Part III of this article.[111]

2. *1981 Model State APA*

The 1981 MSAPA carves out an exception from rulemaking requirements for interpretive rules, but only if the agency lacked authority to adopt the rule as a legislative rule.[112] Moreover, it requires a court to decide "wholly de novo" the validity of any interpretation adopted under this exception.[113] It also contains a carefully guarded exception for criteria and guidelines, used in performing audits and similar functions.[114] In an earlier article, I have criticized these provisions and the analysis will not be repeated here.[115]

Essentially, I believe these provisions contain criteria that will result in confusion and much litigation.[116] For example, the Model Act's interpretive rule exception is too narrow, since agencies frequently have (or at least might have) power to adopt their nonlegislative rules as legislative rules. Enactment of this provision would lead to much confusing litigation about whether an agency did or did not have delegated legislative power. Yet such costly litigation would be wholly unnecessary since, by definition, the agency

111. In any event, the existing California criteria are hardly free of difficult legal issues. See, for example, the recent cases in note 127, *infra*, that refuse to push existing law to its apparent limits. In addition, the "legally tenable" standard for interpretations creates many disputes, the internal management exception continues to raise difficulties, and the remedial consequences of failure to comply with the APA are uncertain. Moreover, the present law imposes an extremely heavy burden on OAL to adjudicate disagreements about the applicability of existing law. As pointed out above, OAL estimates that more than 100 hours of staff time are consumed by each determination of whether a particular underground rule falls under the APA.

112. The 1981 Model State Administrative Procedure Act provides:

> An agency need not follow the provisions of Sections 3-103 through 3-108 in the adoption of a rule that only defines the meaning of a statute or other provision of law or precedent if the agency does not possess delegated authority to bind the courts to any extent with its definition. . . .

MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3–109(a) (1981), 15 U.L.A. 1 (1981). This provision is "bracketed," meaning that states are given a choice whether or not to adopt it. This decision reflected ambivalence by the drafters as to whether *any* exception for interpretive rules was appropriate. *See id.* § 3–109 cmt. at 45.

113. MODEL STATE ADMINISTRATIVE PROCCEDURE ACT § 3–109(b) (1981).

114. The Model State Administrative Procedure Act exempts

> a rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would: (i) enable law violators to avoid detection; (ii) facilitate disregard of requirements imposed by law; or (iii) give a clearly improper advantage to persons who are in an adverse position to the state . . .

MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3–116(2) (1981).

115. Asimow, *Nonlegislative Rulemaking*, *supra* note 104, at 410–16.

116. The narrowness of the Model Act exemptions is at least partially offset by the presence of a good-cause exception that is much more useful than the overly restrictive California emergency rule exception. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3–108 (1981). The California provision is discussed *supra* notes 47 & 76.

did not seek to use its delegated power if it had any. The provision requiring courts to decide the validity of an interpretive rule wholly de novo also seems misguided.[117]

The MSAPA exception for criteria and guidelines is an excellent idea; in fact, I think an exception for instructions to staff relating to law enforcement discretion is probably superior to the federal APA's exception for policy statements.[118] Unfortunately, however, the MSAPA's exception is too narrowly drafted. It covers only situations in which it can be shown that the state would be seriously disadvantaged by disclosure of the material. I believe that all such guidance material should be adopted without prior procedure, in order to encourage its adoption and publicity.

3. *Recently Adopted State Statutes*

A number of states have recently adopted new APAs that are patterned on the 1981 MSAPA. However, none of them have followed the lead of the MSAPA with respect to interpretive rules or to criteria and guidelines, and none have approached the California one-size-fits-all model.[119]

117. *See* Asimow, *Nonlegislative Rulemaking*, *supra* note 104, at 413–15. The question of judicial deference to agency interpretation is a complex one that cannot be discussed in detail here. Essentially, present law contains competing models of strong and weak deference. Strong deference means a court must defer to any reasonable agency interpretation of an ambiguous statute. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). For a persuasive argument that *Chevron* should not apply to an interpretive rule, see Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. REG. 1, 55–58 (1990). *See also* Martin v. Occupational Safety & Health Review Comm'n, 111 S. Ct. 1171, 1179 (1991) (implying that interpretive rules receive lower degree of deference than interpretations deriving from exercise of delegated lawmaking power).

Weak deference means that a court gives greater respect to an agency's interpretation than to the interpretations of other litigants, depending on various factors, such as whether the interpretation was contemporaneous with enactment of the statute and whether the agency maintained it consistently.

The Model State Administrative Procedure Act, § 3–109(b) (1989), apparently precludes the court from giving either kind of deference to an interpretive rule adopted without notice and comment.

118. *See supra* note 109.

119. The North Carolina statute defines "rule" broadly but makes an exception for "[s]tatements concerning only the internal management . . . including policies and procedures manuals, if such a statement does not directly or substantially affect the procedural or substantive rights or duties of persons not employed by the agency. . . ." There are additional exceptions for "[n]onbinding interpretative statements within the delegated authority of the agency that merely define, interpret or explain the meaning of a statute or other provision of law or precedent;" or "[s]tatements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases." N.C. GEN STAT. § 150B–2(8a) (1987).

The Utah statute defines "rule" as an agency's written statement that "(i) is explicitly or implicitly required by state or federal statute or other applicable law; (ii) has the effect of law; (iii) implements or interprets a state or federal legal mandate; *and* (iv) applies to a class of persons or another agency." UTAH CODE ANN. § 63–46a–2(14) (Supp. 1990) (emphasis added). Thus, the obvious objective was to try to define a legislative rule and to limit rulemaking procedure to legislative rules. In addition, there is an exception for "unenforceable policies." *Id.* A "policy" is a statement that "broadly prescribes a future course of action, guidelines, principles, or procedures; or prescribes the internal management of an agency.

The most carefully considered of these provisions comes from Washington. The Washington statute makes a serious effort to define and distinguish legislative and nonlegislative rules and applies its mandatory rulemaking power only to legislative rules. Thus, a "rule" is defined in a way that limits it to generalized statements having legal effect—for example, a rule that states a binding norm of conduct and imposes sanctions if the rule is violated.[120]

Separately, the act defines interpretive statements[121] and policy statements.[122] These are distinguished from "rules" and declared to be "advisory only."[123] The statute also "encourages" the agency to convert its interpretive and policy statements into rules when it is feasible and practi-

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. . . A policy is a rule if it conforms to the definition of a rule." *Id.* § 63-46a-2(11) (Supp. 1990). Thus, the goal was apparently to distinguish "enforceable" from "unenforceable" policies, a distinction that seems similar to the tentative-definitive distinction used in defining policy statements under federal law. *See supra* text accompanying note 109.

The New Hampshire statute defines "rule" in a way that excepts interpretations of agency policy, procedure or practice that are not binding on persons outside the agency. It also has an exception for internal memoranda that set policy applicable only to its own employees and that do not affect private rights or change the substance of rules binding upon the public. Another exception covers informational pamphlets, letters or other explanatory material that refer to a statute or rule without affecting its substance or interpretation. N.H. REV. STAT. ANN. § 541-A:1 XIII (Supp. 1990).

120.

> "Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.

WASH. REV. CODE § 34.05.010(15) (1990). There are exceptions for internal management, declaratory rulings, traffic restrictions, and rules of institutions of higher learning. *Id.*

121. " 'Interpretive statement' means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order." WASH. REV. CODE § 34.05.010(8) (1990).

122.

> "Policy statement" means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

WASH REV. CODE § 34.05.010(14) (1990).

123. WASH. REV. CODE § 34.05.230(1) (1990) declares:

> If the adoption of rules is not feasible and practicable, an agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. An agency is encouraged to convert long-standing interpretive and policy statements into rules.

The definition of "rule" clearly is designed to be limited to legislative rules and to exclude interpretive and policy statements. *Id.* § 34.05.010(15) (1990) quoted in *supra* note 120.

cable to do so.[124] Thus, the drafters of the Washington statute came to the same conclusion as those who wrote the federal act in 1946: they should encourage, not deter, the adoption of guidance material for the public. Nevertheless, by meticulously defining the terms involved and indicating to agencies precisely how they could adopt exempt interpretations and policies, the Washington statute should forestall most of the confusion that has arisen under the federal act. The Washington statute is well drafted and strikes precisely the right note. It describes nonlegislative rules far more precisely than does the federal act but, unlike California and the Model Act, does not try to force them (or most of them) into the same mold as the far more important legislative rules.

B. Judicial Solutions

The courts can undo a good part of the damage wrought by the *Armistead* decision and its legislative sequel. There are several different paths that they might follow.

1. *Quasi-legislative rules*

The APA procedure for adoption of regulations only applies to the exercise of a "quasi-legislative" power.[125] The term "quasi-legislative" is obviously an ambiguous one and it is susceptible to numerous possible definitions. This malleability offers the California courts a golden opportunity to reconceptualize the law relating to nonlegislative rules.

I urge the courts to make clear that the term "quasi-legislative power" refers only to legislative regulations. These are regulations adopted in pursuance of delegated power and that function as law, meaning that by their own force they alter the rights and obligations of persons or entities outside the agency.[126] The rulings of some lower court cases are consistent

124. *Id.* § 34.05.230(1) (1990). *See* William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 WASH. L. REV. 781, 799 (1989).

125. CAL. GOV'T CODE § 11346 provides:

> It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in § 11346.1 [relating to emergency regulations], the provisions of this article are applicable to the *exercise of any quasi-legislative power* conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly. (Emphasis added).

126. California cases have frequently recognized the distinction between legally binding regulations and other agency products that fall short of binding effect. *See, e.g.*, Boreta Enters. v. Department of Alcoholic Beverage Control, 2 Cal. 3d 85, 465 P.2d 1, 84 Cal. Rptr. 113 (1970) (liquor licensees not bound by policy statement prohibiting topless waitresses); Roth v. Department of Veterans Affairs, 110 Cal. App. 3d 622, 167 Cal. Rptr. 552 (Cal. Ct. App. 1980) (agency cannot impose late charges without adopting regulation); San Diego Nursery Co. v. Agricultural Labor Relations Bd., 100 Cal. App. 3d 128, 160 Cal. Rptr. 822 (Cal. Ct. App. 1979) (rule requiring growers to provide access to agency staff not binding until adopted as legislative rule); City of San Marcos v. California Highway Comm'n, 60 Cal. App. 3d 383, 131 Cal. Rptr. 804 (Cal. Ct. App. 1976) (city not bound by illegally adopted deadline for filing applications).

with this approach.[127] Any guidance documents that do not exercise delegated legislative power should not be considered quasi-legislative but instead should be treated as merely administrative.[128]

In the past, the Supreme Court has often referred to quasi-legislative activity and (apart from *Armistead*), it has consistently used the term to mean the exercise of delegated legislative power, *not* mere law-interpretation. For example, in *International Business Machines v. State Board of Equalization*,[129]

127. *See* Aguilar v. Association for Retarded Citizens, 234 Cal. App. 3d 21, 285 Cal. Rptr. 515, 516–18 (1991) (interpretation adopted as a prelude to enforcement does not require APA compliance); Skyline Homes, Inc. v. Department of Indus. Relations, 165 Cal. App. 3d 239, 211 Cal. Rptr. 792 (Cal. Ct. App. 1985) (same); National Elevator Servs., Inc. v. Department of Indus. Relations, 136 Cal. App. 131, 186 Cal. Rptr. 165 (Cal. Ct. App. 1982) (internal staff memo of Department, which lacked legislative rulemaking power, was attempt to exercise quasi-legislative function reserved to a different agency); ITT World Communications, Inc. v. County of Santa Clara, 101 Cal. App. 3d 246, 162 Cal. Rptr. 186 (Cal. Ct. App. 1980) (board's interpretation is not regulation because not adopted as such—thus can be revoked without APA compliance); People v. French, 77 Cal. App. 3d. 511, 143 Cal. Rptr. 782 (Cal. Ct. App. 1978) (state not obligated to follow checklist for administering breathalyzer test since agency had no delegated authority to adopt it); Hubbs v. California Dep't of Pub. Works, 36 Cal. App. 1005, 112 Cal. Rptr. 172 (Cal. Ct. App. 1974) (APA not applicable to department's leasing program because of absence of delegated legislative power); City of San Joaquin v. State Bd. of Equalization, 88 Cal. Rptr. 12 (Cal. Ct. App. 1970) (statistical accounting technique is not a regulation). *But see* Wightman v. Franchise Tax Bd., 202 Cal. App. 3d 966, 249 Cal. Rptr. 207 (Cal. Ct. App. 1988) (apparently treating provisions in administrative manuals as quasi-legislative); City of San Marcos v. Highway Comm'n, 60 Cal. App. 3d 383, 131 Cal. Rptr. 804 (Cal. Ct. App. 1976) (application deadline is quasi-legislative action regardless of absence of delegated legislative power).

128. The term "administrative" is intended as a catch-all to cover anything not quasi-judicial or quasi-legislative.

The legislative history of the 1947 statute frequently used the word "quasi-legislative" but was unclear in defining it. Probably, the intended meaning was that such regulations "have the force and effect of a law enacted by the Legislature," which suggests that only legislative rules were to be covered. INTERIM COMMITTEE REPORT, *supra* note 17, at 1302. *But see id.* at 1298 (broad statutory delegations authorize any kind of rule, whether it be one that pertains to internal management or one that interprets the statute, or fills in substantive details).

An obstacle to this argument is that a rejected version of the 1947 legislation did contain exceptions for interpretive and procedural rules parallel to the federal model. *See supra* note 20. Thus, it can be argued that the legislature meant to reject these exceptions. However, it can also be argued that the legislature found the exceptions superfluous. By limiting the procedural provisions of the APA to quasi-legislative action, the legislature made exceptions for nonlegislative rules unnecessary, because such rules are not quasi-legislative. Thus, no explicit exemption was needed to cover them.

129. 26 Cal. 3d 923, 609 P.2d 1, 163 Cal. Rptr. 782 (1980). Similarly, *see* Bendix Forest Prods. Corp. v. Division of Occupational Safety & Health, 25 Cal. 3d 465, 600 P.2d 1339, 158 Cal. Rptr. 882 (1979) (agency interpretation not quasi-legislative adoption of new regulation); Carmona v. Division of Indus. Safety, 13 Cal. 3d 303, 530 P.2d 161, 118 Cal. Rptr. 473 (1975) (agency interpretation of regulation is not quasi-legislative action); Pitts v. Perluss, 58 Cal. 2d 824, 377 P.2d 83, 27 Cal. Rptr. 19 (1962) (regulation adopted under specific delegation is quasi-legislative); Henning v. Division of Occupational Safety & Health, 219 Cal. App. 3d 747, 758, 268 Cal. Rptr. 476, 482 (Cal. Ct. App. 1990) (court has greater power to review agency interpretation than quasi-legislative discretionary decision); Stauffer Chem. Co. v. Air Resources Bd., 128 Cal. App. 3d 789, 180 Cal. Rptr. 550 (Cal. Ct. App. 1982) (narrow scope of review of quasi-legislative action is founded on separation of powers, which sanctions legislative delegation of authority to agencies); Coastal Comm'n v. Quanta Inv. Corp., 113 Cal. App. 3d 579, 170 Cal. Rptr. 263 (Cal. Ct. App. 1980) (agency interprets statute in order to seek injunction against development—not quasi-legislative action); Cali-

the Court discussed the scope of review of agency regulations; it distinguished sharply between quasi-legislative action, meaning regulations adopted under legislative delegations, and agency constructions of a statute.[130]

One final point on the quasi-legislative argument: the statute using that possibly limiting phrase relates only to the provisions for *adoption* of regulations—not to the provisions for *filing and publication* of regulations.[131] Thus, if nonlegislative rules are held to be outside the APA rulemaking provisions because they are not quasi-legislative, this holding would not drive underground regulations underground. They would remain above ground since the publication provisions would continue to apply to them.

2. *Limit Effect of Section 11347.5*

Obviously, an impediment to any judicial action that cuts back on the scope of *Armistead* is the apparent legislative endorsement of that case in section 11347.5. Enacted three years after *Armistead*, that provision prohibits an agency from issuing, utilizing or enforcing "any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342 . . ." without APA compliance.[132]

However, if the courts agree with the analysis just suggested[133]—that rulemaking procedure in California only applies to quasi-legislative activity—the problem disappears. Section 11347.5 should be construed to apply only to guidelines and other such documents that are *quasi-legislative*, and quasi-legislative means exclusively legislative regulations. Under this approach, section 11347.5 would still have a legitimate role to play. Suppose an agency adopts a rule in the form of an interpretation or a guideline, but in fact the rule is an exercise of delegated quasi-legislative authority—a disguised legislative rule.[134] The courts could use section 11347.5 as the

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fornia Optometric Ass'n v. Lackner, 60 Cal. App. 3d 500, 131 Cal. Rptr. 744 (Cal. Ct. App. 1976) (regulations establishing prices are quasi-legislative).

In Pacific Legal Found. v. Coastal Comm'n, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982), the court held that the Commission's guidelines were quasi-legislative action. The guidelines were legislative rules, adopted under a specific legislative delegation, even though called interpretive guidelines. *Id.* at 312–13 n.4.

130. According to the *IBM* case, in reviewing quasi-legislative action, judicial review is limited to the arbitrary and capricious test. Where the agency is not exercising a discretionary rulemaking power but merely construing a controlling statute, the court has ultimate responsibility for construction of the statute but should accord great weight and respect to the administrative construction. 609 P.2d at 5 n.7.

131. CAL. GOV'T CODE § 11346 (West Supp. 1991), which refers to "quasi-legislative power" applies only to Articles 5 and 6 of Chapter 3.5 of the Government Code. The provisions for filing and publication occur in Article 2. *Id.* § 11343 (West 1980).

132. *Id.* § 11347.5.

133. *See supra* text accompanying notes 125–31.

134. *See* Hillery v. Rushen, 720 F.2d 1132 (9th Cir. 1983) (California corrections department imposes binding rules concerning prisoners' property in staff manuals); Pacific Legal Found. v. Coastal Comm'n, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982) (guidelines held to be quasi-legislative because adopted under specific legislative delegation).

basis for holding that the rule is invalid because of a failure to comply with the APA, and OAL could continue to issue determinations to this effect. Thus, as I suggest that section be construed, it would call upon courts and OAL to be vigilant in uncovering disguised legislative rulemaking, but it would leave undisturbed agency adoption of nonlegislative rules without compliance with the APA.

This approach is supported by the legislative history of section 11347.5. Numerous letters from agencies to the legislature indicate that Speaker McCarthy was carrying Assembly Bill 1013 on behalf of the Prisoners' Union, which was frustrated by the refusal of the Department of Corrections to properly adopt its regulations concerning prisoner conduct instead of placing them in a manual.[135] However, these regulations might very well have been legislative under any definition since they laid down a code of conduct that prisoners were required to follow.[136] Since the legislature's main concern was to require this sort of disguised legislative regulation to be adopted with proper pre-adoption procedure, it can be argued that the legislature was not concerned with proceduralizing agency guidance documents that are not disguised legislative regulations.[137]

3. *Internal Management*

The court should reconsider the scope of the "internal management" exception to the definition of regulation. In *Armistead*, with little analysis, the California Supreme Court held that an interpretive rule that affects persons outside the agency did not fall under the internal management exception.[138] *Armistead* also approved a case suggesting that a regulation relating exclusively to employees of the agency, but which involved an issue of significance to the public, should not be treated as internal management.[139] This seems incorrect. A rule concerning the personnel practices of an agency toward its own personnel should be considered internal management regardless of the substantive issue involved.

The *Armistead* analysis does not clearly prevent a court from treating an

135. *See supra* note 52.

136. *See, e.g.*, Hillery v. Rushen, 720 F.2d 1135 (9th Cir. 1983).

137. However, it is equally clear that solving the prison regulation problem was not the legislature's exclusive concern. Both the legislature's internal staff analyses and the analyses submitted by state agencies made clear that the bill would have a much broader impact. *See, e.g.*, Report of the Legislative Analyst on Assembly Bill 1013 (August 21, 1981) (emphasis omitted): "This bill expressly prohibits a state agency from issuing, using or enforcing an 'informal regulation' unless it has been adopted as a regulation pursuant to" OAL procedures.

138. *See also* City of San Marcos v. Highway Comm'n, 60 Cal. App. 3d 383, 131 Cal. Rptr. 804 (Cal. Ct. App. 1976) (rule imposing deadline on applicants for funds is not internal management).

139. Poschman v. Dumke, 31 Cal. App. 3d 932, 107 Cal. Rptr. 596 (Cal. Ct. App. 1973) (college rules relating to tenure process not internal management since tenure is of interest to general pubic). *See also* State Employees' Ass'n v. State, 222 Cal. App. 3d 491, 271 Cal. Rptr. 734 (Cal. Ct. App. 1990) (agency's policy relating to discipline for its own employees convicted of drunk driving, not internal management, since driving safety is of interest to the public).

agency's instructions to its own staff as internal management. For example, the *Grier* case[140] involved instructions to auditors about how to construct a statistical sample of provider claims. I believe that such instructions should fall under the internal management exception. The agency is simply telling its own employees how to go about their business of enforcing the law. It is rationing its available and highly limited staff resources, deploying them to best advantage.[141]

Of course, instructions to staff *could* be used as a concealed way to impose a new legal obligation (or remove an existing obligation) on regulated parties,[142] in which case they would not be internal management, but this was not the case in *Grier*. It seems perfectly appropriate that instructions to staff concerning the correct means for enforcing the agency's statute, without adding any new legal requirements or obligations that are binding on members of the public, should be treated as internal management.[143] Such rules affect persons outside the agency, of course, but do not require them to do anything that they were not otherwise required to do or otherwise affect their legal rights.

4. *Performing a Statutory Duty*

In the *Faulkner* case, the California Supreme Court decided that an agency's resolutions to build a bridge were not covered by the rulemaking provisions of the APA, despite the great impact of the decision on a variety of people. One of the grounds for that decision was that the resolutions "constituted steps in the performance of a statutory duty, rather than acts

140. *See supra* text accompanying notes 67–69; *In re* Request for Regulatory Determination filed by California Medical Association, OAL Determination No. 18 (1990) (Board's policy not to enforce statute in certain situations is not rule of internal management).

141. Federal cases under the "procedure" exception have reached the same conclusion. Instructions to staff about how to select enforcement targets are exempt from notice and comment procedure because they do not substantially affect the legal rights and obligations of the targets. United States Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145, 1150–51 (5th Cir. 1984).

142. *See* ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULEMAKING 400 (1986). Bonfield points out that an instruction to staff to arrest people who litter in the park could be functionally equivalent to a regulation banning littering in the park. *See* San Diego Nursery Co. v. Agricultural Labor Relations Bd., 100 Cal. App. 3d 128, 160 Cal. Rptr. 822 (Cal. Ct. App. 1979) (instruction to staff to go onto grower's property to instruct employees is unenforceable because it was not adopted as legislative rule). But if there is *already* a statute or a legislative rule against littering, an additional instruction to the staff as to how to catch litterers, or which litterers should be charged, should be treated as internal management.

143. Thus, the court should disapprove *Grier* and cases like Stoneham v. Rushen, 137 Cal. App. 3d 729, 188 Cal. Rptr. 130 (Cal. Ct. App. 1982), *supp. op.* 156 Cal. App. 3d 302, 203 Cal. Rptr. 20 (1984) (administrative bulletins instructing staff to set up scoresheets to implement existing regulation is not internal management); Poschman v. Dumke, 31 Cal. App. 3d 932, 107 Cal. Rptr. 596 (Cal. Ct. App. 1973) (university's procedures for awarding tenure is not internal management). It should approve cases like Americana Termite Co. v. Structural Pest Control Bd., 199 Cal. App. 3d 228, 244 Cal. Rptr. 693 (Cal. Ct. App. 1988) (general counsel's plan for selecting and grading investigatory targets falls within internal management exception).

which would 'implement, interpret, or make specific the law.' "[144] This reasoning could easily be adapted to the case of staff instructions like the auditing protocol involved in *Grier*. When a statute makes an agency responsible for carrying out a specific duty, the means by which the agency structures its law-implementing discretion could be treated as exempt from the APA within the meaning of the *Faulkner* case.

5. *Strengthen the "Only Tenable Interpretation" Exception*

As mentioned earlier,[145] OAL has established an exception from the broad definition of "regulation" in the APA.[146] If an interpretation states the "only tenable interpretation" of the law, it is not a "regulation" subject to the APA and OAL scrutiny. There is some judicial support for this approach.[147] Courts could view this approach broadly, holding that straightforward interpretations, guidelines, illustrations, or staff instructions, that exclude only strained or implausible readings of the law, would not be treated as regulations.

6. *Individual Letters*

OAL holds that a pattern of individual advice letters constitutes an underground regulation.[148] However, this seems incorrect. Section 11343(a)(3) of the California Government Code excepts from filing requirements (and thus from other procedures[149]) a regulation that "[i]s directed to a specifically named person or to a group of persons and does not apply generally throughout the state."[150] According to OAL, if similar letters are sent to different persons, this exemption is inapplicable because the rule stated in the letters applies "generally throughout the state."

However, I believe that so long as the letter is a response to a request for advice, or is some other sort of individualized communication such as a warning letter, the exemption should apply. A communication to a single person or group of persons does not "apply generally throughout the state." Moreover, it would seem that the publication of such letters in the California Regulatory Notice Reporter or the California Code of Regulations would make little sense. It seems unlikely that the legislature would have wanted

144. Faulkner v. Toll Bridge Auth., 40 Cal. 2d 317, 322, 253 P.2d 659, 664 (1953).

145. *See supra* text accompanying notes 59–62.

146. Although frequently stated in OAL determinations, OAL has not yet adopted the "only tenable interpretation" approach in its own regulations.

147. Liquid Chem. Corp. v. Department of Health Servs., 227 Cal. App. 3d 1682, 1698, 279 Cal. Rptr. 103, 111 (Cal. Ct. App. 1991) (memos and flow charts merely illustrative of actual laws and regulations that had been lawfully adopted).

148. OAL Determination No. 12, *supra* note 66, at 405–06. *See also* Goleta Valley Community Hosp. v. Department of Health Servs., 149 Cal. App. 3d 1124, 197 Cal. Rptr. 294 (Cal. Ct. App. 1983) (letter from staff attorney to hearing officer); Winzler & Kelly v. Department of Indus. Relations, 174 Cal. Rptr. 744 (Cal. Ct. App. 1981) (response to request for advice by employer group).

149. CAL. GOV'T CODE § 11346.1 (West 1980).

150. *Id.* § 11343(a)(3).

such wasteful publication. If the publication requirements are inapplicable, so are the other APA rulemaking requirements.

7. *Limit Remedies*

The courts should make clear that the remedies employed in underground regulation cases like *Grier* and perhaps in *Woosley*[151] are inappropriate. Of course, if an agency has not validly adopted a *legislative* rule, persons apparently subject to it are not bound by it.[152] However, the remedies for invalid adoption of a nonlegislative rule should be different.

If an agency has adopted a nonlegislative rule without compliance with the APA, whether it is law-interpretive or discretion-confining, the sole legal effect is that persons outside the agency should not be bound to follow it, and the courts should not defer to it as they normally would.[153] Thus, as occurred in *Armistead*, courts could more readily find the interpretation was erroneous under the statute than would normally be the case. Similarly, they could determine that discretionary action was arbitrary, capricious, or an abuse of discretion, or unauthorized by statute, without reference to the discretion-limiting nonlegislative rule. Under no circumstances should the court invalidate agency action simply because it was taken in reliance on an invalidly adopted nonlegislative rule, such as occurred in *Grier* and perhaps in *Woosley*.

VI. CONCLUSION

Notice and comment procedure for rulemaking is generally regarded as a solid success—but like most good ideas, it can easily be pushed to extremes.

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151. *See supra* text accompanying notes 69–71.

152. *See* cases cited *supra* note 126.

153. This was the only sanction approved by the Supreme Court in *Armistead*. 22 Cal. App. 3d 198, 583 P.2d 714, 747–48, 149 Cal. Rptr. 1, 4–5 (1978). *See also* Jones v. Tracy School Dist., 27 Cal. 3d 99, 611 P.2d 441, 165 Cal. Rptr. 100 (1980) (no deference to internal agency memo as opposed to regulation subject to notice and comment); Liquid Chem. Corp. v. Department of Health Servs., 227 Cal. App. 3d 1682, 1698, 279 Cal. Rptr. 103, 110–11 (Cal. Ct. App. 1991) (rules not adopted under APA merely illustrative and not essential to ALJ's finding that appellants had violated hazardous waste laws); Division of Labor Standards Enforcement v. Ericsson Info. Sys. Inc., 221 Cal. App. 3d 114, 270 Cal. Rptr. 75 (Cal. Ct. App. 1990) (agency failure to adopt policy as regulation does not defeat its right to have court enforce prevailing wages); Johnston v. Department of Personnel Admin., 191 Cal. App. 3d 1218, 236 Cal. Rptr. 853 (Cal. Ct. App. 1987) (no deference given underground regulation); Carden v. Board of Registration for Professional Engrs., 174 Cal. App. 3d 736, 220 Cal. Rptr. 416 (Cal. Ct. App. 1985) (admission of illegally adopted bulletins at administrative hearing was not prejudicial because irrelevant); Planned Parenthood Affiliates v. Swoap, 173 Cal. App. 3d 1187, 219 Cal. Rptr. 664 (Cal. Ct. App. 1985) (guideline adopted without APA compliance cannot be used to narrow statute in order to make it constitutional); Ligon v. State Personnel Bd., 123 Cal. App. 3d 583, 176 Cal. Rptr. 717 (Cal. Ct. App. 1981) (interpretation invalidly adopted—court does not defer but nevertheless finds the interpretation was correct). *But see* Wightman v. Franchise Tax Bd., 202 Cal. App. 3d 966, 249 Cal. Rptr. 207 (Cal. Ct. App. 1988) (apparently allowing manual provisions to serve as binding regulations).

Somehow, during the last decade or so, the California legislature came to believe that there were too many rules and the ones that existed were too complex, confusing, superfluous, or unjustified. Rather than deregulate, it transformed a simple and informal rulemaking process into a massively complicated one and it created OAL to ride herd on the process. Viewed together and especially as applied to nonlegislative rules, these reforms may well have carried the idea of rulemaking due process past its logical stopping point.

Without giving adequate consideration to the consequences, the California Supreme Court in *Armistead* equated a trivial interpretive rule to a legislative rule and narrowed the internal management exception to near invisibility. The result of this joint judicial-legislative construction project is a procedural obstacle course that generates relatively little in the way of benefit and imposes serious costs. It deters agencies from carrying out a vital responsibility: the issuance of interpretive and policy material to guide members of the public and agency staff. Every Californian loses.

Today, government has increasing responsibilities and decreasing resources. In an era of governmental austerity, it is vital that precious resources not be employed inefficiently. Administrative law should require agencies to observe procedures that facilitate effective and efficient government, but it should not force them to adhere to procedures having little utility. California should deregulate the regulators and once more encourage rather than discourage its agencies to provide guidance to the public.