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COMMON LAW, EQUITY, AND AMERICAN PUBLIC ADMINISTRATION

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This article evaluates the claims of those who advocate the use of common law as a corrective to the statutory and rule-based excesses of the American administrative state. Their claims are assessed in light of common-law history and in terms of current administrative law. Although many claims are exaggerated or simply wrong, there are some aspects of common law that deserve attention in public administration. These are explained from the perspective of common-law evolution. Common law developed in a very pragmatic and experimental fashion and therefore displays some qualities public administrators will find useful, especially in the adjudicative realm of agency decisions, but more broadly as well. A model with five features of common-law practice is presented for public administrators to use in improving an agency's decision making under law.

This article critically examines an emerging literature that advocates reinvigoration of common law as a corrective to the excesses of the modern administrative state. Contributors to this literature make several claims for the common law. These are assessed in light of common-law history, and many are found wanting. Some of them, however, have merit and are worthy of attention by public administration scholars and practitioners. The analysis identifies specific features of common law that public administrators should know more about. They should learn about these first because these are likely present in some form in most agencies and could be applied more astutely and systematically for greater benefit. Furthermore, they are amenable to use by a variety of officials, not exclusively by attorneys. They are especially applicable to the variety of informal and formal adjudicative decisions in agency life but also extend beyond adjudication to types of decisions not recognized in the current structure of American administrative law. Perhaps as important, they can be applied to the realm of quasi-governmental and third-sector organizations. There they may provide a basis for rule by law in ways that current administrative law cannot.

This article also advocates an approach to common law that is developmental in nature. Much of the history of common law is one of pragmatic experimentation and adjustment to changing conditions. The same conditions and needs apply to much of the work of public administration, especially in the vast informal realms of

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agency activity. These realms are formative of both policy and administrative practice and therefore also of law. But because they are formative, they are also premature. Decisions at this level most often escape scrutiny by superior bodies such as courts and legislatures and yet demand reasonableness—a minimal standard of legality—if they are to last. When treated in developmental fashion, the features of common law discussed here can provide flexible modes of administrative adaptation that will meet the standard. As such, they compose a distinctive model of common law for administrative use. The more formal and rigid features of the common law, as currently practiced by attorneys and judges, are thus downplayed.

ADVOCATES OF THE COMMON LAW

In 1994, Philip K. Howard published his book *The Death of Common Sense: How Law is Suffocating America*. In it he details how decision making in public agencies has been perverted through a simplistic devotion to procedural law. In his book, he presented some rather complicated political and legal developments (such as “interest-group liberalism” [Lowi, 1979] and changes in American legal philosophy) in easy-reading prose. The book quickly became a hot seller and was subsequently used by conservative politicians as yet more evidence of the need to reform government.

Howard’s solution to this legal/administrative malaise, however, has been criticized for being trite and vague at best and dangerous at worst (Wirth & Silbergeld, 1995). He advocates giving public administrators the power to cultivate and use their own common sense in making decisions that do not impinge on fundamental rights. Howard wants public managers to apply their judgment in the application of legally established goals and principles rather than have them bound by elaborate and expensive rules of procedure that, for the sake of clarity and consistency, often lead to absurd results.

Howard equates his “common sense” approach to decision making under common law. We should resist, Howard (1994) says, the “obsession with preordained rules,” which requires strict adherence, and return to “law that allows thinking.”

Before American law became the world’s thickest instruction manual, it worked on general principles that reflected the law’s goals. The common law has plenty of rules and guidelines, but they are subservient to broader principles. If applying a guideline in a particular case seems inconsistent with the principle, an exception is made [without compromising the principle].... Principles allow us to think. (pp. 175-176)

Howard is not alone in making such claims for the common law. Numerous legal scholars have touted its virtues and advocated its resurgence. For example, Richard Epstein (1995), in *Simple Rules for a Complex World*, echoes Howard’s diagnosis and explains in detail how common-law principles can work to simplify our legal

system and help us cope more effectively with many social ills. Unlike Howard, Epstein reveals a strong bias in favor of private, market-styled social interaction to solve problems. The common law can facilitate this kind of interaction, he believes, whereas public agencies—as currently administered—help promote unrealistic aspirations for social justice and equity and promulgate rules mired in comprehensive rationality. The latter approach leads to complex and overly refined rules that only lawyers can understand, thereby creating rule by lawyers. At best, Epstein argues, a legal system can provide permanence and stability by protecting private property and the freedom of contract. It is unrealistic, even dangerous, to expect more of law (Epstein, 1995, pp. ix-49). He would, therefore, severely curtail governmental action.

In similar fashion, Richard Posner (now a federal judge) and William Landes advocate the theory that common law, and especially tort law, promotes economically efficient decisions. They attempt to demonstrate through application of mathematical models that common-law decisions tend to maximize the creation of wealth while reducing administrative costs (cf. Landes & Posner, 1987; Posner, 1986). They claim that this efficiency is “neutral” with respect to distribution of wealth. That is, it promotes wealth and reduces costs irrespective of who benefits by it.

In a somewhat different vein, David Sciulli (1992) contends that the common-law tradition provides a necessary antidote to the creeping authoritarianism of modern constitutional regimes by encouraging more independent, collegial institutions. Such institutions possess the means to evaluate and restrain sovereign authority in much the same manner the legal profession did in English history. There it grew as a restraining influence over kings and set the stage for mixed government. Sciulli thereby offers a “non-Marxist critical theory” that he believes inheres in common-law practice.

Other authors have also tried to tailor specific aspects of common law to existing governing institutions. Guido Calabresi, for example, builds a meticulous and sophisticated argument for vesting limited powers of statutory revision in the American courts. He believes we suffer from a growing imbalance of statutory laws (called “statutorification”), many of which are obsolete, or worse, out of step with the “legal topography” that tends to faithfully reflect the basic will or interests of the American people. Judges are situated, due to their particular competencies in our legal landscape, to exercise some powers of revision through common law. As with the previous writers, Calabresi sees common law as that branch of law best equipped to make evolutionary and localized changes that are less abrupt than those occurring by statute. This same evolutionary process may be applied to the revision of obsolete laws—a task performed very poorly by legislatures. The courts are uniquely qualified, he argues, to use their case-based mechanisms to soften the deleterious effects of statutorification (Calabresi, 1982, chap. 1 and 9).

At the agency level, scholars such as Alfred Aman, Peter Schuck, and Gary Bryner have conducted detailed analyses of rule-making processes and concluded that substantial reform is required. They believe some common-law mechanisms

would be useful in the effort. Bryner (1998, pp. 251-252) concludes that “[a]dministrative law, despite its history of ‘reform,’ has ultimately failed to produce either efficient or accountable government.” Agreeing with Howard, he believes “[g]reater administrative discretion may be necessary in order to strike a more effective balance between these two expectations.” He advocates more flexible approaches to our most pressing problems.

Schuck (1984) discovered some very promising results in the use of equity processes by the Office of Hearings and Appeals within the U.S. Department of Energy. Decisions “in equity” have existed at least since the time of Aristotle. They enable officials to relieve the deleterious effects of law by granting exceptions under special circumstances. “Equity” is a necessary complement to “law.”¹ It has long been associated with common law but has been used as a complement to statutes and rules as well (Aman, 1982; Cockrell, 1975; Lambrou, 1981). Agency forums applying “regulatory equity,” as Schuck (1984) terms it, can do much to soften the harsh and unjust effects of many rules. Aman (1982) applies the same analysis to administrative processes generally, and develops a typology of administrative equity that Schuck subsequently applies to regulatory contexts.

Finally, a few public administration theorists have called for the use of common law as a useful model in administrative practice. Michael Spicer and Larry Terry (1996), following the lead of Jay White (1990) and Norton Long (1993), argue that some facets of common-law reasoning should be applied by public agencies engaged in statutory interpretation. They view the 1984 Supreme Court decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* as substantially bolstering agency powers of legal interpretation of enabling statutes. They note that the decision reinforces the oft-cited two-step test² for determining when an agency can appropriately engage in legal interpretation and that it also assumes public administrators should know how to interpret statutes (Spicer & Terry, 1996, p. 40). They argue that managers should avail themselves of some basic common-law practices to aid them in this process. Spicer and Terry focus specifically on “reasoning by example” and precedent. Public administrators already use a form of common-law-like reasoning to “make sense of what is going on” (White, 1990, p. 138) and should apply it in similar fashion to statutory interpretation when statutes are unclear. Precedents should be used in the sense of looking for alternative administrative actions in past agency practices.

Following Spicer’s earlier work (1995), Spicer and Terry (1996) argue that this common-law approach follows an antirationalist worldview adopted by our founders, and is potentially more effective and legitimating given the constitutional system we have inherited from them. First, the use of precedent serves as a restraining principle on the exercise of administrative discretion. Second, building an edifice of administrative precedents can help deter interference by legislative factions and mitigate “the harm done to citizens as a result of innovations or changes in legislative policies” (p. 44). Third, such precedents provide more predictability and less mutability in administrative decisions for citizens. The founders attacked

mutability as the source of much abuse and distrust of government. Stability conduces to wise governance and respect by the populace. Finally, they argue that the common-law approach to statutory interpretation “seems consistent with the founders’ view of the limits of reason and the importance of experience as a guide to human action” (p. 45). The use of precedents brings past experience to bear on current circumstances, thereby connecting past and present generations of administrators and expanding their pool of wisdom.

ASSESSING THE CLAIMS FOR THE COMMON LAW

What are we to make of these claims for the use of common law in public decisions? On a general level, they form part of the broader political challenge to the regulatory and service agendas originating in the American Progressive and New Deal eras. New Deal jurists and regulators successfully displaced the common law’s dominance over many social and economic arenas, replacing it with an infrastructure of regulatory agencies and social programs that remain in place today.³ However, the bureaucratic horrors of World War II spurred a conservative intellectual reaction (Nash, 1976) led by social and economic philosophers such as Friedrich Hayek, Milton Friedman, Richard Weaver, and Russell Kirk. Hayek’s writings, especially those stressing the complementary relation between common law and free markets (cf. Hayek, 1960, 1973), form an ideological foundation for many of the authors discussed above. The overwhelming predominance of laissez-faire ideology today, combined with the burgeoning of alternative (third-sector) and experimental forms of governance and service provision, make possible certain adaptations of common-law principles and mechanisms.

Second, their claims accompany a resurgence of interest in states’ rights, which has reinvigorated issues of federalism once thought settled (Hebert, 1997; Rosenbloom & Ross, 1998; Wise, 1998, 2001). Cases recently decided by the Supreme Court’s “gang of five” have strengthened the states’ hands against federal mandates.⁴ The move to states rights’ provides opportunities to adapt common-law mechanisms much as they were adapted in the 19th-century era of courts and parties (Skowronek, 1982).

The claims of these writers need to be evaluated against the historical evolution of common law and its relation to statutory law and agency rules. It is here that their problems and prospects come more into focus. The assessment covers the following six basic claims: (a) that a strong complementary relationship exists between common law and free markets; (b) that common law promotes simplicity and common sense; (c) that common law promotes limited government; (d) that the common law ensures social stability; (e) that precedent and *stare decisis* are central to the common law; and (f) that the common law provides greater flexibility and promotes good judgment.

Claims for Common Law and Free Markets

The claims by Epstein, Posner, Landes, and others for the complementary relation between common law and free markets can be evaluated by framing them in historical and political context. An important fact is that the common law preceded modern free markets by many hundreds of years. In England, for example, it helped establish feudalism and more centralized authority following William's conquest in the 11th century. William and his successors (especially Henry I, II, and III) gradually usurped the powers of local courts, co-opted their sheriffs and magistrates, and replaced their local customs with a law "common" throughout the realm.⁵

In subsequent centuries, their success spawned a very tight-knit, independent guild of lawyers and judges who controlled the development of the common law into its specialties (torts, contracts, estates, equity, and so forth). They created an independent administrative system of devices and governance structures over the society (cf. Brannon, 1998; Dale, 1902; Tubbs, 2000). In many respects, the idea of common law as the custom of the realm became transmuted into the "common learning" of judges and lawyers at court (Tubbs, 2000).

In the 17th century, this elite profession then served as a vitally important mediating institution for accommodating the new and burgeoning business practices of mercantile capitalists. Mainly through distinctions and devices born of administrative expedience, they fashioned a new contract law that provided the legal certainties and calculability needed by landed and merchant classes operating in an emerging international, mercantile political economy (Francis, 1983, pp. 127-137).

Part of that change entailed substantial limitations on the powers of common-law juries. Once thought of as a handy labor-saving and educational device for judges in feudal England, juries had become the weakest link in the justice system—a huge source of uncertainty to enterprising merchants and nobles. By the early 17th century, contract cases inundated the common-law system, thereby pressing for change (Francis, 1983, pp. 63-93). The limitations subsequently imposed on contract cases involved limiting juries to narrow, "single issues of fact defined through lawyers' pleadings; limiting availability of damage remedies... limiting recoupment of defendant damages... and... enforcing contract bonds that liquidated the amount of the claim" (Francis, 1983, p. 69). These changes garnered more power and insularity for the legal profession and fostered a "symbiotic" and very profitable relationship with merchants and nobles (Francis, 1983, pp. 131-135). By the end of the 17th century, English common law had been thoroughly functionalized for a capitalist political economy. Thereafter, a period of rigid legal formalism ensued to preserve the new order. Jurists, proud of the vast mercantile empire they helped create, enshrined their legal system as the font of stability, order, and natural law (e.g., freedom of contract) even while instrumentalizing it.

Although the U.S. Constitution serves as our fundamental law, the common law was grafted into its structure and existed as a serious rival to statutory law throughout the 18th and 19th centuries. Its development follows a pattern very similar to English common law after feudalism. The difference lies mainly in that here it

adapted more to an ideology of free-market capitalism than to mercantile capitalism.

Morton Horwitz (1977) described this transformation of American law as a functionalizing process. Whereas many of the founding generation viewed the common law as inherently fixed and determinate due to its association with natural law, following generations reinterpreted it as a matter of popular consent and therefore as “an instrument of human will.”⁶ This instrumental conception enabled 19th-century jurists to break down ancient but restrictive principles such as “just price” or inherent value in things and to support the idea of negotiable market value (also see MacDonald, 1985, chap. 6). In the process, they fashioned a jurisprudence that would make property and contract rights a spur for national economic growth and development (Friedman, 1973; Hall, 1989; Horwitz, 1977; Hurst, 1977).

As this process ensued, the American legal profession reformed the common-law system of pleading and set about limiting the power of juries for essentially the same reasons it was done in England (Horwitz, 1977, chap. 1; Nelson, 1975, chap. 9). The reforms increased the power and insularity of the American legal profession and tied them closely to the rising business class. By the mid-19th century, most of the reform was complete, and the legal profession began the process of rigid formalization through reform of legal education in case law and through constitutional doctrines such as substantive due process. The courts became a dominant and conservative partner with political parties and the new corporate class over the governance system (Skowronek, 1982). It was this rigid common-law system that Progressive and New Deal Era reformers sought to eclipse with a more adaptive regulatory state (Hurst, 1977).

Common-law history demonstrates that it can indeed be made to complement a market system. But it is also clear that common law has been adapted to serve many types of political societies, including feudal and perhaps even medieval systems based on ancient communitarian principles rather than modern liberal ones (Brannon, 1998). Furthermore, common law has been adapted to serve different types of capitalist systems, not simply those based on free-market principles. The claim by Epstein and Posner that the common law is efficient and best suited for regimes with limited government must, therefore, be qualified by context and purpose.

The common law was ill-suited to capitalism and markets while it served feudal England. It was first used to consolidate the powers of kings who had little interest in limited government, and then 600 years later to consolidate power for merchants and royalty for the sake of a mercantile empire. It is significant that this era of empire gave rise to modern executive power and a bureaucratic system in both common law and code law regimes (Braudel, 1967; Tilly, 1975). Much of the American distrust of governmental power stems directly from abuses by royal governors and their king wielding mercantile powers (Hurst, 1977).

Posner’s claim for “neutral” efficiency of common law must be viewed skeptically as well because it can only make sense under the functionalizing norms of capitalism (e.g., where wealth must be concentrated in the hands of capitalists).

Such claims would have made no sense under feudal common law. It is also quite evident that the relationship between common law, a civil society, and its markets is anything but simple. It requires an elite cadre of officials (especially lawyers) to develop, sustain, and mediate the system's responsiveness to competing social classes and groups. In this respect, it is no different than regimes based on code law (cf. Page, 1944, p. 1). Any regime that bases governance on the principle of rule of law—any kind of law—requires a robust and powerful legal profession.

Claims for Simplicity and Common Sense

Claims for simplicity and common sense are also problematic in the history of common law. The process of distinguishing cases, articulating principles, and accreting rules of practice becomes an art form all its own. As the forest of cases grows, specialization becomes inevitable, and with it, complexity abounds. Furthermore, as formalization progresses, the technicalities of the common law begin to overwhelm even the most astute attorneys. The level of detail and rigid process create increasing delay. Dockets are clogged, and justice falls ever deeper into the arms of administrative expedience. Statutory reforms of the common law in England were directed at just these kinds of problems. Moreover, equity courts emerged as a significant alternative when the rigidities of common law could not be overcome. And then, ironically, the equity system itself gradually became so convoluted and ingrown that it nearly ground to a halt in the 19th century. Charles Dickens made it a subject of derision in his story of *Bleak House*. In such a light, Epstein's and Howard's claims for parsimony and simplicity in common law show little merit.

Nor does the common law necessarily promote or support commonsense thinking. Howard would have been equally appalled at the lack of common sense during the periods of rigid formalism in common law. Discretion and commonsense judgments are required to make every type of legal system work well. Correspondingly, every type of legal system will suffer when legalists prevail. The history of the common law does not simply reflect a history of common sense. Rather, it reflects the evolution of political societies and their governing professions through significant periods of decline as well as progress.

Claims for Common Law and Limited Government

The history of common law has much to do with selectively centralizing and decentralizing power, whether for the sake of feudal protection and stability or for the development of innovative capitalism under limited government. English kings used common law to centralize their power over disparate fiefdoms. Their success, however, entailed concessions to the functionaries who helped the kings secure their domains. Over time, this led to a substantially independent legal profession capable of interfering even with kingly whims. (Sciulli sees the same dynamic between the legal profession and today's centralizing executives and their bu-

reaucracies.) Parliaments and other competing political institutions grew out of this milieu into the mixed regime that is the English constitution.

In the United States, the legal profession assisted the development of a national market economy—rationalized and enshrined in corporate law—and buttressed by courts and party machines. The centralizing corporate trusts and their attending political machines grew so powerful and abusive that they spawned a counter-movement toward progressive reform. A new middle-class generation of reform-minded lawyers reacted to this rigid formalism with a new jurisprudence (sociological and realist) born of American philosophic pragmatism. Following influential social and legal philosophers such as Dewey, Holmes, and Pound (1908), they expounded an instrumental conception of law very similar to that used in the early 19th century. The reformers set about creating rival powers, first through legislatures and independent regulatory agencies and eventually through the executive branches of our governments.

Many judges, backed by powerful corporate interests, resisted these changes through their edifice of constitutional doctrines and common-law precedents (cf. Hall, 1989, chap. 12). Progressives availed themselves of reinterpreted constitutional doctrines and statutory law to enact their reforms. They created a new legal framework for an age of statutes, rules, and executive orders wherein public agencies would seek to rein in huge corporate administrative machines and their attending courts and parties (Friedman, 1973; Hall, 1989; Skowronek, 1982).

The claims by Epstein, Sciulli, and many others that the common law promotes limited government, and provides antidotes to the centralizing tendencies of modern constitutional regimes, must therefore be regarded equivocally. Common law has been used to promote as well as limit centralized power. Its use in providing antidotes depends on a host of other social and political factors. Today, it may be serviceable to some extent as conservatives continue to gut or hollow our national regulatory framework, and to establish greater barriers to timely rulemaking. These conditions have led to the oft-cited flight from rulemaking. Agencies thus relegated to informality and case-by-case decisions may find common-law principles and devices increasingly useful.

Finally, Calabresi's approach to ameliorating the extent of statutorification through common-law modification by courts does offer a novel adaptation of common law for purposes of limited government. It is novel because in legal history, statutes were used to modify or supplant common law, not vice versa. His solution is also controversial because it justifies even greater activism by the courts, based on the debatable proposition that they are uniquely qualified to judge the consistency of any given statute within the nation's legal landscape—a manifestation of the popular will that includes "changing technologies and ideologies" and "evolving values" (Calabresi, 1982, p. 98). This is very broad knowledge indeed. One critic (Delahunty, 1983, p. 358) argues that such knowledge is more characteristic of the professorate than of judges. It may be argued that such knowledge best emerges from a mix of institutional sources that should include the public administration. Judges, through the appellate process, learn much about their world from

public agencies. And public agencies, interacting routinely with interest groups and clients, are often first to discover and articulate problems with statutes. Calabresi's argument is strengthened by including agencies as part of the statutory modification process. An ongoing discourse among these institutions about obsolescence and fitness with the legal topography would add a moderating scrutiny to a court's judgments, thereby muting the extent of their new activism.

Claims for Common Law and Social Stability

Epstein's claim that common law promotes social stability through predictable and calculable rules has some merit, especially in English history. There, the common law evolved and functioned over many hundreds of years, and its period of transition to mercantile capitalism took well over 100 years. The slow accretion of principles and gradual evolution of decision devices (writs, rules, injunctions, and so forth) under common law is well matched to the English conception of stability and change.

Americans tend to be extraordinarily impatient by comparison. Their faith in progress and innovation induces rapid social and economic change and subjects them to frequent mass political movements and accelerating tides of reform (Light, 1997). Their free-market capitalism displays far more volatility in terms of business cycles, social disruption, and entrepreneurial reforms in business practice. Adapting the common law became extremely difficult as the pace, scope, and complexity of these changes increased. The rise of highly specialized and interdependent markets during the late 19th and early 20th centuries created problems of national scope that required systems of policy and managerial direction to overcome. The common law, with its rigid adversarial structure, could not respond in timely fashion, much less with any systematic remedy. Formalization only increased the difficulty. Statutes and administrative rules eclipsed much of the common law simply because they were more useful to Americans in facilitating and coping with rapid, systemic change (Friedman, 1973; Hall, 1989, chap. 12 and 13). Epstein's claims for social stability are therefore problematic at best in the American context.

Claims for Centrality of Precedent and the Doctrine of Stare Decisis

Spicer and Terry's claim for the centrality of precedent to common law is also subject to qualification. First of all, it is important to distinguish the general use of precedent from the more specific and binding doctrine of stare decisis. Precedents have been used throughout common-law history in a variety of ways but primarily as practical aids for decisions and as educational tools for the legal profession. Stare decisis, the policy that binds judges to settled points of law from prior cases, is relatively new in common-law history. It developed very slowly over the 16th and 17th

centuries and has since been followed inconsistently despite being revered in word by much of the legal profession (cf. Horwitz, 1977; Radcliffe & Cross, 1977, p. 370-373).

In earlier centuries, most case reporters did not even record decisions. Rather, they reported only the arguments in the cases for purposes of education in the forms of reasoning at law (cf. Radcliffe & Cross, 1977; Tubbs, 2000). Common-law lawyers in these periods took a flexible and adaptive view of their craft, much as public administrators do today. Historians note that the process of pleading at court was treated in similar experimental fashion. Lawyers could submit them and later withdraw them for modifications as the cases proceeded.

In the United States, many legal commentators, historians, and textbook writers indicate that *stare decisis* has been practiced haphazardly at best by our courts. Horwitz (1977, chap. 1) explains that the instrumentalizing of common law by jurists quickly led to justifications for “why they were free to disregard the authority of prior cases” (p. 26). It was very difficult to abandon binding legal precedents when the common law was viewed as a font of natural law or as a system that held a successful mercantile empire (England) together for more than 200 years. However,

as adherence to precedent began to be understood [by Americans] as just one of a number of techniques for allowing men to order their affairs with regularity, judges were thus prepared to abandon precedent in order to create substantive doctrines that would themselves assure greater predictability of legal consequences. (pp. 26-27)

The early American regime constituted a developing third-world nation subject to the whims of three Western colonial empires. The force of binding precedent in its legal system would only retard its growth. As judicial statesmen, the early jurists (especially Chief Justice John Marshall) put the needs of development above those of adherence to legal norms established abroad.

Nor has binding precedent played a consistent or pervasive role in our law since. Only during the later 19th-century period of legal formalism was it used with any kind of reverence and consistency. American legal commentators routinely note the pervasive influence of legal realism and the corresponding “activism” of our courts (cf. Carter, 1998, *passim*). This remains in keeping with the American penchant for rapid development and reform born of an undying faith in progress and change. In comparative context, the doctrine of binding precedent plays a very modest role at best in our legal system.

Finally, Spicer and Terry’s remarks about the stability and consistency through precedent should be qualified by Edward Levi’s insights in his classic work on legal reasoning (Levi, 1949). Levi explains that the process of case-law reasoning entails both stability and change. His book describes a three-stage process in which, at first, legal concepts are created as cases are compared; then settled for a while as cases are classified under or outside of the concept; and then are broken down as

“reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word [legal concept] is no longer desired” (p. 9). The scope, duration, and meaning of a legal concept “depends upon a determination of what facts will be considered similar to those present when the rule was first announced” (p. 2). The finding of similarity or difference in cases is what determines whether stability or change will occur. It is a dynamic process of *meaning negotiation* as circumstances (relevant facts and principles) change. Precedents are subject to this fluid process and are thus more often tentative and short-lived than is generally acknowledged.

Public administrators, therefore, should not overplay deference to binding precedent through appeals to common-law practice or principle. This does not mean that precedents should always be avoided in administrative settings. They may be very useful as educative tools, or as flexible decision tools, but their use as binding authority should be limited and carefully applied. One must look to circumstances in which binding precedent will provide both accountability and effectiveness. Such usefulness will vary in agencies depending on the type of discretion they must employ and on whether they are developing new standards and practices or enforcing well-established ones.

Claims for Common-Law Principles and Judgment

Most of the common-law advocates treated in this analysis share the claim that common-law practices can bring more flexibility and better judgment to public decisions. As Howard (1994) said, common law is “law that allows thinking” (pp. 175-176). Its case-by-case structure is conducive to iterative learning and accretion of wisdom. Still, serious qualifications must be noted in light of common-law history. Howard’s statements about the common law are especially vague and in need of context.

A vital distinction in common-law history exists between decisions made under law and decisions made under equity. Rules, whether from common or code law, have always been regarded as limited devices for achieving justice. Their broad sweep and rigorous character betray a corresponding lack of regard for fairness to specific individuals in their particular circumstances. Rules address typical cases and thereby may work severe injustice in atypical situations. Thus, as Joseph Story (1870), one of America’s great jurists and early Supreme Court Justices, wrote,

Equity, as a distinct branch of law, is the complement of legal administration whereby through defect of evidence, or from imperfect procedure, it is unable to afford that ample and specific redress for all injuries, which courts of equity may do by requiring the defendant to answer, upon his conscience; by reforming mistakes in written contracts; and by injunctions, both restrictive and mandatory; and in many other ways. (p. 1)

Equity became an especially important complement as common law evolved a more rigid structure and procedure, thereby limiting substantially its forms of remedy. “[C]ourts of common law are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff, or for the defendant” (Story, 1870, p. 21). This exclusive, either/or form greatly limits a common-law court’s ability to deal with situations demanding reciprocal remedies and complex allocations. Equity courts emerged, therefore, as a more flexible alternative for dealing with whole classes of situations not cognizable under common law (such as trusts and fraud), as well as with specific situations falling under its auspices. A classic example of the latter may be found in contracts, where a court of equity can compel the performance of a contract through injunction, whereas “a common-law court can only give damages for the breach of it” (p. 22). These functions are added to the general role of providing more specific relief in the nature of an exception “when through [a law’s] generality it bears too hard in particular cases” (Blackstone, 1765, p. 92). Exceptions allow decisions at variance with a law without challenging its general validity. They may be based on limiting or overriding principles or simply on the basis of undue hardships that work contrary to the spirit of the law.

Jurists have also made some accommodation for equity within common law by introducing equitable principles such as *reasonableness* in tort law and negligence cases. These appear to be the type of principles to which Howard refers. They are principles that invite thoughtful and flexible judgment. Significantly, as Schuck (1984) indicates, these same kinds of principles are also found in “the open-ended, indeterminate standards [of] much modern legislation” (p. 163). Moreover, exceptions processes associated with equity have been applied in various ways to agency rules (Aman, 1982; Lambrou, 1981; Schuck, 1984). It is reasonable to conclude, therefore, that Howard’s thesis about rules not accommodating good judgment, while the common law does, actually distorts the reality that both are made more sensible and just by using equity as a counterbalance.

In addition, Howard’s common-law prescription is bothersome for its inattention to the institutional arrangements by which judgment in equity has been circumscribed. For example, equity courts have historically been carefully limited by jurisdiction and procedure. In many periods, they were given separate jurisdiction from common-law courts. Gary McDowell (1982) explains that this separation provided an important check. He quotes the *Federal Farmer* to illustrate.

It is a very dangerous thing to vest in the same judge power to decide on law, and also general powers in equity; for if the law restrains him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate. (p. 11)

McDowell (1982) emphasizes that the flexibility of judgment in equity has always been troubling because of its potential for abuse of power. He therefore favors continuing its institutional separation from common-law courts. He also

notes that its jurisdiction had consistently been limited to civil matters (chap. 1). Even William Blackstone (1765, p. 92), who generally downplayed the distinction between equity and common law, noted that equity had been applied only to civil as distinct from criminal law.⁷

Where jurisdiction could not hem equity in, jurists have subjected it to the binding forces of precedent, principles, and rules of procedure. As McDowell (1982, chap. 2) indicates, American courts have emphasized these methods as they abandoned institutional separation. This led, however, to a dilemma wherein our understanding of equity as a distinct set of principles and procedures has become muddled. What difference really exists between law and equity when both are restrained by the same devices? McDowell believes this has led, ironically, to the very result the *Federal Farmer* feared. Whether one agrees with McDowell's ultimate conclusions, the historical concern over equity power deserves consideration in administrative application as well (cf. Lambrou, 1981; Schuck, 1984, p. 180). Howard fails to address such matters, preferring instead to grant broad powers of judgment irrespective of differing agency and policy contexts.

A final and perhaps more obvious point must be made in response to these common-law advocates. Most agencies already have a significant body of common law evolving from statutory and constitutional interpretation. This is true even at the federal level despite negative treatment by some Supreme Court judges.⁸ Many agencies have developed guiding precedents from key cases and are influenced by the courts to render their decisions "more regularized, generalized, visible, and susceptible to judicial scrutiny and control" (Schuck, 1984, p. 181). Much of this is a common law of administrative procedure well known to students of administrative law. But it does not stop there. Many substantive doctrines and principles have evolved from agency case law to meet the specialized needs of any given policy subsystem. They are developed through case-by-case adjudication rather than by promulgation of rules. This practice grows today as legislatures and political executives complicate rulemaking procedures with new requirements and more oversight (cf. Bryner, 1987, 1998; Kerwin, 1999, chap. 6 and 7). In addition, some agencies already make equity decisions concerning statutes and rules. They may gain this power from explicit statutory provisions or from judicial and agency interpretation of statutes and rules (Aman, 1982; Lambrou, 1981; Schuck, 1984).

Common-law advocates certainly know these facts. Some of them, such as Epstein, are simply opposed to the existence of this vast administrative system on ideological grounds and therefore pass over such details in the desire to see it wither. Others, such as Howard, Spicer, Terry, Calabresi, and Schuck, seek further articulation of common-law principles and practices as a way of improving the existing system. This author's views coincide with this latter group in spite of the criticism that has been leveled at them. The existing system of statutes and administrative law exhibit significant weaknesses that common-law practices may help overcome.

AN EVOLUTIONARY MODEL OF ADMINISTRATIVE COMMON LAW

The model proposed here is intended to help administrators understand how some important features of common-law evolution can broaden their conception of the law of public administration beyond the overly simplistic structure of formal administrative law.⁹ That existing structure recognizes the need for flexibility through informal rulemaking but fails to comprehend the evolutionary nature of agency development and decision making. The common-law model proposed here offers a way of approaching and understanding that development. The model can aid administrators in thinking about how their agencies develop standards and practices over time that are at once useful and lawful.

Most governmental agencies have diverse missions in varying stages of institutional development. It will be more helpful, therefore, to apply common-law practices from various historical periods that correspond at least roughly to stages of development and types of discretionary power that exist within agencies. Current adaptations lack such coherent development, being haphazardly and sporadically used at best (cf. Schuck, 1984, p. 191). This is true in part because most public administrators are unfamiliar with the common law's historical features and how they might be adapted to agency administration. The model emphasizes the following five basic features of common-law development:

1. Reasoning by analogy;
2. Principles;
3. Equity;
4. Precedent and *stare decisis*;
5. Reporting.

Readers should note that the model is developmental in two senses. First, as explained above, its elements are helpful in coping with development through agency lifecycles. Second, they may be applied selectively to different areas of agency activity and thereby loosely adapted to the policy-development process. Finally, no hierarchy is imputed to the elements. Rather, some will be more applicable than others, contingent on the circumstances.

Common-Law Reasoning in Public Administration

The advantage of the proposed model is that it is oriented to institutional development. It is an organic approach in the sense that its practices and standards emerge more from use and casuistry than from rationalistic or systematic design. It begins with analogy rather than planning.

Analogy is a basic building block of common-law reasoning as employed through the case method. Compared to philosophical and analytical reasoning, it is

simple and unsystematic and yet can be extraordinarily powerful as a tool of influence and judgment (White, 1990). For example, vast areas of public administrative practice were reshaped in the 1960s and 1970s when the federal courts adopted Charles Reich's (1964) argument that some governmental services and benefits were more like property than privilege. The analogy induced practices now deeply embedded in education and social services administration at all levels of government, despite subsequent U.S. Supreme Court decisions that restricted its sphere of application. A more recent example is the argument that some regulatory practices amount to unjust taking of property. The analogy strengthens the justification for new regulatory hurdles such as regulatory flexibility analysis and congressional review now required by the Federal Administrative Procedure Act (sections 601-801).

The value of analogy lies in its explorative nature. As indicated above, the lawyers of early English common law recognized this quality, employing it in an experimental manner. They were developing new standards of justice and new ways of administering them. Modern administrative agencies often find themselves in similar conditions as a result of new or evolving missions and because of newly mandated methods for achieving them. Thus, they are commonly presented with emerging problems for which no standards or rules exist. For example, the advent of the World Wide Web and e-mail have created serious problems for criminal justice agencies, financial institutions, and anyone handling confidential material. The affected agencies must develop standards without an overarching theory or system to inform their progress. Analogies can be used in such circumstances to give structure and definition to specific problems and their solutions. The analogies used are often diverse and will likely yield conflicting views of the nature of the problem and its appropriate solutions.

Over time, one analogy may give way to a rival in the fashion described by Levi (1949) and Carter (1998) and thereby trigger changes in practice or policy. Much attention is given to how this occurs through courts, but courts handle only a tiny percentage of these problems. Moreover, the courts usually hear such cases only when they are fully ripened. Public agencies must deal with the vast bulk of cases on their own and at every conceivable stage of development. Furthermore, they usually develop them in an environment of mission advocacy and implementation rather than detached impartiality. Administrative cases are thus typically more amorphous and variable in nature and are more often employed explicitly as tools of policy development. Administrative analogies, therefore, will be more tentative, flexible, and inconsistent. It is vital that agencies be allowed to cope with problems in this fashion while acknowledging the problematic nature of the endeavor. The emerging practice of public contracting will help to illustrate why.

The political pressure for privatization of governmental services over the past two decades has created an entirely new field of public contracting and has spurred significant evolution of nonprofit and for-profit public-serving organizations. The area suffers from lack of sufficient study and is highly diverse and inconsistent in its practices. Little of it resembles the quasi-judicial or quasi-legislative activity

recognized in administrative procedure acts. Public officials have been pushed into the activity with little help even from their legal staffs.

Contracting for public services is not a simple matter. The use of contract is complicated in its own right because its form must be adapted from private law to fit public-service missions. Many mistakes among states and localities occur for lack of an adequate conception of the desired relationship among the parties. This makes problematic the provision of safeguards and enforceable standards that define acceptable levels of performance and effectiveness. As Cooper (2000, p. 572) observed, we are rediscovering some problems with public contracting that commonly existed before the rise of modern administrative law. Contract negotiations between public agencies and private service providers do not always consider the public interest as a guiding factor.

Cooper (2000) further explains that insufficient attention has been paid “to the relationship between vertical, authority-based, positive-law-grounded model of administrative action on contracts and the horizontal, negotiated, common-law-originated model” (p. 572). Today, administrators must often learn to adapt the common-law model. They must accommodate their agencies to more horizontal, negotiated sharing of authority with the contracted organization while preserving authority and power sufficient to guarantee that public missions are met. This is a tall order, one that provokes grave concern as to whether it can be achieved with any consistency.

Nevertheless, the model is especially useful to state and local jurisdictions. These jurisdictions have always struggled with the vertical, authority-based model, primarily because their closer proximity to clients and their circumstances demand more mutuality and negotiation. Their powers are relatively weak in relation to many of their clients, especially corporate players, and therefore must often rely on their federal counterparts as an authority card to help them preserve public interests in the negotiations.

There is much to learn from the myriad practices of performance or “relational” contracting, and it will take more time to reach a mature and coherent state (Cooper, 2000; Goetz & Scott, 1981; Macneil, 1978). This is especially true regarding the diverse relationships between public agencies and the emergent neopublic sphere of “quasi-governmental” (Moe, 2001), nonprofit, and for-profit service organizations. At one end of a spectrum, contractual relations can resemble standard business contracts for production of discrete goods or services. There may be little meaningful difference today, for example, in contractual arrangements with for-profit and nonprofit hospitals because they now operate by the same business practices. Somewhere in the middle of the spectrum are contractual arrangements with “mediating structures” (Berger & Neuhaus, 1977) that provide buffers for individuals and groups as they interact with large bureaucratic systems to get help. These include voluntary associations, churches, parachurch organizations, social-service firms, and networking organizations that link vendors of social and educational services. Their services are vital but also much more intangible, variable, and difficult to assess. Many of them involve some entanglement with religious groups and

thereby raise church/state questions. Toward the other end exist contracting organizations that perform what are considered traditional public functions such as law enforcement and management of prisons and usually require longer term contracts with complex performance standards and oversight responsibilities for multiple agencies.

In the absence of an overarching theory or compelling classification system for these diverse organizations, administrators can employ analogies to tailor contractual relationships. They must examine the nature of the contracting organization and the services provided to build in more accountability, better incentives, and improved working relationships. For example, should the contractual relationship resemble traditional, loosely coupled, competitive commercial character, or should it resemble more a marriage to a single vendor whereby the organizational boundaries and responsibilities will blend and blur? What will the contract terms look like with such differing relations? What should the contract-termination provisions entail?¹⁰ The details of the contractual relationship will vary dramatically depending on which analogy is adopted.

From the standpoint of common-law evolution, the value of these analogies lies more in their articulation and comparison over time than in the results of any specific application. Public managers need time and flexibility to explore their comparative usefulness. It is too early to be thinking about authoritative precedents and principles or rigid categories of contractual relations. It is more important for public officials to experiment with how an agency's administrative law can branch and diversify its connective mechanisms by analogy to the burgeoning neopublic sector. This follows Cooper's (2000) view of "administrative law as the law of connections."

It will be increasingly important to focus on the way in which public law facilitates the many relationships that make up the modern fabric of governance and also the ways in which that law can and should place boundaries around them so as to conform to the Constitution, individual rights and liberties, and the rule of law. (p. 572)

In contracting for public services, that is a process more akin to common-law evolution than statutory or rule-based imposition.

Common-Law Principles in Public Administration

There is merit in Howard's claim that principles rather than rules should more often guide administrative decision making. His book is full of examples of how rules can interfere with commonsense decisions. Howard (1994) opens his text with the poignant example of Mother Teresa's Missionaries of Charity giving up on an effort to open a homeless shelter in an abandoned building in New York City (pp. 3-5). They gave up because, after 2 years of procedural hoop-jumping to secure

necessary permits, they were prohibited from opening the shelter until they installed an elevator. The Sisters could not justify the substantial additional cost for something they did not need, and no one seemed ready to grant an exception to the building code. The rules prevailed after much expense, the city lost a new shelter, and the building remained abandoned.

These absurd results occurred, Howard argues, because bureaucrats were bound by rules written to meet middle-class standards of satisfactory housing. They were not allowed to develop principles concerning adequate housing that could be thoughtfully adapted to differing socioeconomic circumstances.

Principles can indeed encourage officials to think their way to commonsense solutions rather than simply obeying rule-based formulas. But this outcome is hardly preordained. Many lawyers and judges throughout history have applied common-law principles as blindly as some bureaucrats adhere to rules. So we must inquire what it is about legal principles that can lead one to make thoughtful decisions.

In common law, principles are attempted determinations of the essential legal meaning of cases. They are attempted in the sense that words are imperfect vehicles for expressing or capturing meaning. As Leif Carter (1998) indicates, "common law can evolve by a process of fumbling from one half-formed concept to another" (p. 93). Determining essential legal meaning refers to (a) identifying the grounds on which an official should act (or not act) in a given case, (b) what rights, duties, or privileges should extend to the parties involved, and (c) what remedies are available and appropriate. It generally takes many cases to develop adequate or useful legal meanings. Thus, principles do not usually arise from each case but from comparison of many cases. In this developing context, precedents are treated only in an explorative and educative fashion to help form useful (not universal) principles. Precedents are not used here as settled or binding authority as under the doctrine of *stare decisis*. Furthermore, an emerging principle does not prescribe a specific outcome but provides a moral standard that leads one in a direction in which a type of outcome may be tailored with some forethought (Dworkin, 1977, p. 24). For example, in the matter of regulating installation of septic systems, a local public works agency might develop a principle about the location of septic systems that encourages builders and building inspectors to take reasonable precautions relative to a nearby fresh water supply. Such a principle would invite consultation and accommodate a variety of safety adaptations. The alternative is to write a rule that specifies that septic systems shall be placed a minimum distance from fresh water, regardless of the circumstances. Both approaches can work fairly effectively, but the latter does not require much thoughtfulness and is much less adaptable.

When conceived in this manner, legal principles involve a basic thought process that is gradually tempered by experience, context, and an awareness of the institutional conditions of one's role as a public official. They can help public administrators cope with the continua of political life in terms of lawful as well as sensible

purpose and action. It is one way of making the ideal of rule by law more practicable and adaptable.

Returning to the Missionaries of Charity, one can imagine a scenario wherein New York building officials inductively derive principles regarding safe and usable housing that can be flexibly applied to diverse socioeconomic circumstances. Instead of promulgating prescriptive codes, they would build an edifice of cases and derive principles for tailoring legitimate and effective decisions. To make this scenario plausible, however, one must reorient officials to the rudiments of this type of practice. It would do little good to institute a case method of analysis and application among officials who are trained to apply hard and fast rules. They would quickly glean nascent principles from the earliest precedents and make them binding for all future cases. They must be trained to think casuistically, and that would entail a substantially different kind of training and perhaps even new job qualifications.

Furthermore, it may be impossible politically or administratively to substitute principles for a system of rules in a thoroughly established regulatory framework. Such arenas are more likely amenable to an exceptions process than to wholesale administrative reform. An exceptions process would introduce officials to the development of essential legal meanings on a more limited and gradual basis.

It is more prudent to experiment with principles in new or rapidly evolving regulatory arenas and in any other arena in which a mediative type of discretion is required. These involve situations that are less amenable to rules and codes because the criterion of action is ambiguous and often in dispute (Leys, 1943, p. 18). Case-by-case decisions are often already prevalent in these arenas, but officials may not be cognizant of the need to derive legal principles that can inform subsequent decisions. They may not have mechanisms in place that induce them to think about essential legal meanings underpinning the cases.

Finally, one must also recognize the danger inherent to policy making via incremental decisions and attendant principles (cf. Lipsky, 1980). An agency can drift into practices that are obnoxious in result. For example, a case-by-case building safety practice that accommodates different socioeconomic characteristics across a city can also entail *de facto* discrimination on racial grounds. Administrators can become perpetrators of invidious double standards (cf. Rosenbloom, Carroll, & Carroll, 2000).

Administrative Equity

Administrative procedure laws typically fail to distinguish exceptions adjudication from adjudication under rules or codes. As a result, exceptions processes are probably the feature of common law most in need of systematic attention in public administration. The extensive play of statutes and agency rules in American society demands that more attention be paid to mitigating their unjust effects. Though statutes and rules give effect to many general and beneficial policies, they are also

susceptible to serious weaknesses. To avoid these, an administrator may choose “to bend or fictionalize” rules to accommodate equity, or he/she may create an equity-based exception (Summers, 1978, p. 907). The advantage of exceptions is that they are granted only when they follow the spirit of the laws deemed to apply to that situation. They neither challenge the legitimacy of the laws nor stretch their application beyond credulity. Schuck (1984, pp. 173-180) provides an extensive review of the weaknesses of general rules and the corresponding need for equity. Briefly, their weaknesses entail limitations of form, knowledge, comprehensiveness, and articulation.

The Need for Equity

Limitations of form involve the generality of rules, their transparency, and the number of unweighted factors in their application. The more general a rule is, the more circumstances will arise in which they can weigh unjustly on some individuals. Transparency is “the degree to which [a rule] evokes uniform interpretations in different minds” (Schuck, 1984, p. 172). If a rule is indefinite, or employs many unweighted decision factors, it will be difficult to predict how cases arising under it will be decided. On the other hand, a rule may be so transparent, so determinate, as to deny any flexibility in outcome. In either case, equity processes can help rectify wrongs.

Rules are shaped for future application and thereby entail significant limitations of knowledge about the changing circumstances of their application. Legislators and agency rule makers have a number of options for coping with such limitations. They can forgo rulemaking entirely and form policy on a case-by-case basis. They can make rules containing vague and unweighted criteria to flexibly adjust to changing circumstances. Or they can “devise a more determinate rule to govern what [they] think the future will bring but create an auxiliary administrative process that can provide equitable relief from the rule whenever appropriate” (Schuck, 1984, p. 175). Equity will eventually be needed under all of these options, but the latter offers more immediate predictability for the public and induces public officials to think explicitly about designing effective and accountable equity processes as a complement to the law.

Rules seldom if ever succeed at being comprehensive in scope. Agencies typically have multiple, competing objectives, and conflicts among rules inevitably arise. Moreover, other agencies often share overlapping jurisdictions, and this makes interagency rule conflict likely. Beyond that, the superintending branches of government will often modify agency goals and rules to accommodate changing political priorities. Equity processes are useful under each of these conditions as a way of integrating or balancing competing priorities in specific situations.

Finally, there are limits to our ability to articulate thoroughly the grounds of our decisions, and some decisions may even preclude it entirely. As Schuck (1984) indicates, “there are decisions the justice or correctness of which cannot intelligibly

be measured by their consistency with a rule" (p. 178). The nature of the decision may be antithetical to generalization as in cases in which highly specialized judgments are required that are essentially intuitive in nature (e.g., a physician diagnosing a rare condition or prescribing an effective remedy without benefit of definite knowledge or principles). Or the decision "may be designed to be wholly discretionary" because the "application of rules to particular facts generates pressures that threaten the system's continuing viability or integrity" (p. 178). Schuck uses the pardoning power as an example. It is a plenary power, "exercised without any governing standards." To structure it with rules would "impair its ability to give justice individual form" and "undermine its very *raison d'être*" because executive clemency "is an expression of mercy, an act of grace, an acknowledgement of the insufficiency of rules" (p. 179). Such decisions are usually rare, and the risk of abuse is great, so most of them are carefully confined to narrow, low-risk conditions. Nevertheless, they are an important recognition of the need for equity as a complement to general laws.

The Scope and Categories of Administrative Equity

The need for equity processes in public administration brings with it serious concern about hemming it in. Aman (1982) echoes McDowell's warnings when he says that "if exceptions to rules are freely and easily granted, with little or no regard for principle, the 'inner morality of law' may be jeopardized" (p. 292). An unbounded exceptions process can easily erode the coherence of rules and policies and replace them with unbridled discretion. Aman, therefore, examines some general categories of administrative exceptions and their susceptibility to limitation by articulable principles.

Hardship exceptions. These focus on the peculiar circumstances of a particular party, without reference to any broader considerations such as their ongoing relationship with the agency or with the direction of agency policy. Aman (1982) identifies economic, technological, legal, and medical hardships as common to this arena and finds them amenable to containment through application of fairly well-established and delineated principles. For example, a principle addressing economic hardship says that

equity will not allow the application of a particular regulation to force a firm out of business or to render a piece of property valueless unless the social benefits of compliance with that regulation outweigh the severe costs to the petitioner. (p. 299)

The principle is commonly applied to such activities as zoning variances and exceptions to environmental regulations. Under legal hardship, a commonly applied principle says that "equity does not require compliance with a rule or regulation when such compliance necessitates breaking another rule or regu-

lation” (p. 300). Aman finds the principles in all these areas limitable to a fairly narrow or reasonably defined scope, despite difficulties inherent in some cost-benefit analyses. All of them “serve the underlying purposes of the regulatory regime to which they apply” (e.g., they abide by the principle that equity should follow the law) and they invoke compelling norms such as need for economic survival and the avoidance of “enforcing rules against those who cannot comply” (p. 303).

Fairness exceptions. These exceptions apply to individual hardships as well, but in relation to regulatory program goals, and to disparities in effect on similarly situated entities. For example, an equal protection principle states that “equity does not allow a regulatory program to impose a disproportionate share of a regulatory burden on only one or a few entities” (Aman, 1982, p. 307). Another says that “equity may allow an exception to a rule that penalizes a firm for good faith action taken prior to the rule’s existence,” for example, an estoppel exception based on the norm that a regulated entity “should be able to rely on the law then in existence” (p. 310). Finally, a “reasonableness exception” grants relief when “a rule either does not further the goals of a statute or minimally advances those goals at a cost to the petitioner wholly disproportionate to the benefits produced” (p. 311).

Aman indicates that these exceptions can pose some difficulties of containment but on the whole are still amenable to sensible use and limits. The equal protection exception provides an ethical expectation (based in constitutional principle) for administrators to equalize the effect of their programs and thereby buttress the legitimacy and fairness in the eyes of entities who are regulated. Such exceptions are relatively easy to confine if the cause of the comparative unfairness is established. The comparison of effect among “competing firms is [then] relatively unambiguous, and the financial burden incurred... is usually quantifiable” (p. 309). Estoppel exceptions pose greater problems for containment unless they are “limited to situations in which the underlying goals and policies of the rule suggest that, in the case in question, compliance was not intended in the first place” (p. 311). Otherwise, any unforeseen change may become a ground for an exception, and no regulatory scheme could remain effective under that condition. Reasonableness exceptions may be effectively contained if granted only when “compliance yields negative or zero social benefits” (p. 313). Using the exception more liberally as general weighing of costs and benefits “could open the door to endless litigation, delay, and frustration of the agency’s regulatory task” (p. 313)

Policy exceptions. These exceptions do not fit under the traditional conception of equity because they focus more on overall policy goals and outcomes than on individual circumstances of inequity (Schuck, 1984, p. 193). They are an adaptation of equity to increasing rigidities in the policy-making and enforcement machinery of government. Agencies need them for a variety of reasons,

including the modification and creation of policy “without adherence to formal or complex hybrid rulemaking procedures” (Aman, 1982, p. 314; Schuck, 1984, p. 196). In such cases, however, the intention should generally further higher purposes already established. For example, “equity may allow an exception to a rule to preserve or further national security” (Aman, 1982, p. 316). Some laws contain explicit provisions for exceptions under conditions of war or other emergency, whereas others may only imply them.

Public interest policy exceptions allow agencies “to pursue policy goals that are in the public interest and that are not inconsistent with the regulatory goals of the program” (Aman, 1982, p. 317). The public interest language directs the agency to grant exceptions when enforcement of the agency’s rules would, in specific instances, have the effect of actually frustrating its broader statutory objectives. The existence of hardship in specific cases is thus less important to officials than making existing rules consistent with broader policy.

In other cases, an agency may grant exceptions less for granting relief to a petitioner than to mitigating adverse effect on the broader public (e.g., third-party or beneficiary exceptions). For example, a state health department may grant exceptions to some provisions of life safety codes in a rural clinic or hospital rather than shut them down, not because of burdensome costs of compliance but because it is the only facility providing vital health services to a rural area. This type of exception could have been applied to the *Missionaries of Charity* case, wherein the requirement of an elevator is suspended because of the severe shortage of homeless shelters.

Means exceptions may be granted if the desired results of a rule are achieved by other means (Aman, 1982, p. 314). Many codes specify technical requirements that are cognizant only of certain means of compliance. A firm may find an alternative means of compliance that fails to meet the technical requirements but meets the overall policy standard. Contractors building homes with alternative materials (such as straw-bale construction) commonly run into such conflicts, yet are sometimes granted exceptions as long as they meet broader safety and construction standards.

Schuck’s (1984) in-depth study of exceptions processes in the Department of Energy’s (DOE) Office of Hearings and Appeals (OHA) showed that exceptions decisions can also be used effectively to create new policy, even at levels where legislation would normally be required. The DOE’s rulemaking processes had become quite cumbersome in the wake of regulatory reform, and its leadership had to cope with rapid change and controversy in significant areas of the energy industry. Schuck discovered that the OHA administrators had cultivated a reputation for wise decisions on the merits in a wide array of cases, and that policy makers had given it autonomy to the point that it could create policies much more unobtrusively than through legislation and rulemaking. This enabled the DOE to evolve policy more effectively in response to its changing and contentious task environment, whereas policy makers were able to avoid much of the political pressure that could easily have forced them to make unwise policies from above.

Schuck (1984) was understandably ambivalent about the use of equity process in this fashion because of the risk of abuse and failure. Despite its success, he was nervous about the rather haphazard evolution of OHA's role as a policy maker alongside its role in providing specific equitable relief under existing rules. He did not view the OHA's policy-making role as illegitimate *per se* but could see where it easily might become an illegitimate operation unless more institutional ties were made to the formal policy-making process. It needed controls that would "safeguard the full range of values that the exceptions process is supposed to pursue" (p. 299). Reforms should "encourage greater formal involvement by officials responsible for policy formulation and implementation." This could entail a "sign-off" on policy-making exceptions by the secretary and/or involvement of relevant program officials in "party-like" (pp. 299-300) roles in the adjudicative proceedings themselves and thereby apprise policy makers at an earlier stage when exceptions decisions will affect policy.

At root here is the concern expressed by McDowell that equity processes be carefully structured and made institutionally discrete. Though he might well be troubled by the policy-making adaptations of administrative equity, he would likely support recognition by administrators that equity processes should be distinguished structurally from other adjudicative and legislative powers. For this to occur, public administrators need to understand the historical meaning of equity, its value to their enterprise, and its potential for abuse.

Administrative Precedents and Stare Decisis

The case for administrative precedents as binding and stabilizing authority has already been ably put by Spicer and Terry. What the authors lack is attention to the appropriate administrative conditions for application of *stare decisis*. As stated earlier, precedents are not appropriate in early stages of policy or mission development. In this developmental model, appropriate conditions are those that require high degrees of consistency and certainty. The history of common law indicates, for example, that binding precedents are needed where governmental missions interact with or help sustain mature commercial enterprise. Conditions in which high risk, uncertainty, and competition abound are often ripe with demands for a system of stable precedents and principles, even within some well-established regulatory frameworks. As Spicer and Terry indicate, statutes and rules may still permit broad discretionary powers that can pose high risk and uncertainty in their own right. Binding precedents can fill these gaps and slow changes in policy to a tolerable rate.

Second, due to the substantial hurdles imposed on most rulemaking (formal and informal), many agencies now opt for policy making through case-by-case adjudication in situations in which they would formerly have enacted rules. Binding precedents in these situations can function as useful surrogates for rules.

It must be emphasized that use of *stare decisis* in administrative contexts should be quite limited. This model applies precedent mostly as an educative tool for use at informal stages of decision and policy. There, precedents are valuable sources of

analogy and principle. They can help officials as they fumble with partially formed concepts and practices at informal stages of decision. The challenge is to make them readily available and to orient agency officials to their use.

Reporting

An important political maxim says that the strengths of any governing system are always alloyed with attending weaknesses. This applies equally to systems of law. This common-law model's strength lies in its developmental and adaptive qualities. A significant weakness lies there as well. Common law tends to develop as a complex and relatively hidden body of law (cf. Strauss, 1974). It is far less accessible by outsiders than statutes and rules because it is drawn from a sea of internally derived cases and is constantly evolving. Standards and principles are tentative, explorative, and inconsistently applied. Though this is essential for early institutional development and adaptation, it can be unsettling to citizens, clients, and their counsels. The courts have recognized this problem and have at times penalized agencies for lack of consistency and predictability in their case law. But as mentioned earlier, the common-law development discussed here would be premature for court oversight. Accordingly, it is vital that agency officials provide correctives to mitigate the severity of the problem.

One corrective to consider is the publication of agency casebooks that distill and summarize emerging policy arguments and attempt to telegraph the general policy thrusts of the cases. This is a difficult task, one that can lead to premature formalization of policy and thereby seriously compromise the benefits of the common-law approach. Managers would have to take some care in selecting cases that are typical and likely to contribute insight about an agency's policy dispositions. Some agencies already do this. For example, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) antitrust divisions publish summaries of significant advisory opinions in addition to reporting cases at varying stages of development and adjudication. They publish safe-harbors guidelines for a number of industries and provide many case examples to illustrate and telegraph their enforcement policy. Despite general fear of antitrust enforcement, ample information and policy reasoning exists for anyone who really wants to predict the likelihood that an enforcement action will occur and at what level of severity. Along the way, one can learn a great deal about the overarching policy philosophy of the FTC and DOJ pursuant to their enabling statutes and guiding court decisions. The agencies have successfully constructed an edifice of persuasive precedents and developmental common law that, as suggested by Spicer and Terry, may even resist undue meddling by elected politicians.

The problem is that efforts of this sort are sporadic and in need of more systematic attention by public administrators and educators. This applies especially to many state and local jurisdictions as they confront increasing opportunities for common-law development.

CONCLUSION

The history of common law reveals an approach to governance that is quite useful, even in the age of statutes. It does not belong solely to attorneys and judges who settle private disputes. Rather, its history shows us that it forms an integral part of regime development and evolution—matters that are central to the work of public administration. Common law exists in all our agencies today, but its value is not well understood by public administrators. It remains a tool mainly for agency counsels who must concentrate their efforts at the formal, legal end of public affairs.

This article demonstrates that common law entails much more than that. It can stimulate development of simple analogies that have far-reaching policy and administrative implications without any demands for comprehensive knowledge and design. It encourages officials to develop and apply principles that articulate essential legal meanings and avoid the minimalistic problems of rules.¹¹ Its precedents can be used as heuristic tools at early stages of development and as surrogates for rules at more mature stages. Officials can mitigate the harsh and unintended effects of rules and statutes by instituting exceptions processes based on equitable principles. The existence of formal exceptions machinery may help legislators as well as agency officials ply a middle ground between broad delegations of power and overly specific language that hampers thoughtful application. Agencies entrusted with broad and complex responsibilities may also adopt general rules and then employ an exceptions process for accreting more definition of standards and structure over time. They can also use equity proceedings to develop or change agency policy, provided that appropriate oversight of the process is built in. Such proceedings could have significant effect on the results of subsequent formal adjudication, as well as on agency policy and practice.

It is important, however, to acknowledge that the common-law model is no panacea, the claims of some common-law advocates notwithstanding. It has inherent weaknesses as well as strengths. Its history of reform bears this out. It can foster troublesome complexity and opaqueness, cultivate its own expert cadres, and exhibit its own brand of rigid and stultifying legalism.

That said, the public administration stands to gain from this model because it adds diversity to the forms of law at its disposal. It thereby increases the stock of tools and practices needed by public administrators to make wise and lawful decisions at all stages of agency and policy development.

NOTES

1. Readers of public administration literature should note that this type of equity bears little resemblance to the concept of social equity advanced by scholars such as George Frederickson and associated with the “new public administration” movement of the 1960s and 1970s (cf. Marini, 1971). Frederickson and his colleagues advance social equality under the rubric of equity. Classical

equity, on the other hand, stems from a much broader conception of fairness in which just results are sought from the systemic failures of law, while preserving the laws' underlying principles and ends.

2. The "two-step test" on statutory construction states that if Congressional intent is clear on a matter, then there is no construction to be had by either court or agency. If, however, Congress has not directly addressed the precise matter at issue, then the court will not simply impose its own construction on the statute but rather will determine if an agency rationale is based on a permissible construction of the statute. This applies when Congress explicitly left a gap in the law for the agency to fill and when it implicitly delegates such power. In the latter case, the courts should defer to a "reasonable interpretation" by the agency administrator. In the former case, the agency should promulgate rules to fill the gap.

3. The influence and work of Louis Brandeis, Felix Frankfurter, Hugo Black, James Landis, Alfred Kahn, and Charles Francis Adams were especially important during this era. Landis's (1938) book, *The Administrative Process*, represented perhaps the most compelling work on the subject at the time. For historical and biographical perspectives on these and other New Deal leaders, see Irons (1982), Karl (1963, 1983), McCraw (1984), Ritchie (1980), Hawley (1966), Auerbach (1975), Murphy (1982), and Dunne (1977).

4. The "gang of five" consists of Justices Rhenquist, Scalia, O'Connor, Kennedy, and Thomas. Three cases decided at the end of the 1998 term have revived an old juridical and political controversy. See *Alden v. Maine*, 527 U.S. 706 (1999); *Florida Prepaid Post-Secondary Education Expense Board, et al. v. College Savings Bank*, 527 U.S. 627 (1999); and *College Savings Bank v. Florida Prepaid... et al.*, 527 U.S. 666 (1999). For discussions of the general trend of Supreme Court decisions favoring reinvigorated state sovereignty, see Wise (1998) and Hebert (1997).

5. I have drawn from the following sources on the history of English common law: Pollock and Maitland (1895), Dale (1902), Plucknett (1983), Radcliffe and Cross (1977), Kempin (1963), Biancalana (1988), Francis (1983), Turner (1985), Arthurs (1985), Tubbs (2000), and Brannon (1998).

6. The notion that judges make rather than discover law is generally attributed to late-19th-century legal realists such as Oliver Wendell Holmes Jr. As realists, however, they were describing what was by then a prominent reality—one created by their juristic predecessors. What must be added under this construction, of course, is that all public officials (even bureaucrats) "say what the law is" in some fashion, and with finality more often than not (cf. Lipsky, 1980; Paulson, 1994).

7. The English did not permit judges to stray from the letter of the criminal law because they feared some might wish to inflict a harsher punishment than provided. The crown could use the pardon where the letter of the law seemed overly harsh in a particular case.

8. For example, in *Erie RR. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court per Justice Brandeis asserted that there is no general common law, only the common law of each state. This is correct in the formal sense, as the Constitution forms the fundamental law of the nation. However, it is plain that federal agencies have amassed an agency-specific common law over the years as the extent of statutory interpretation and case adjudication has increased. Furthermore, as noted, many agencies now enjoy specific and formal equity powers within their own jurisdictions. It is time that we recognize this as a significant aspect of public administration and administrative law.

9. I am referring to the legal structure imposed through state and federal administrative procedure acts, most of which recognize only simplistic distinctions between rulemaking and adjudication, informal and formal rulemaking proceedings, and so forth. These laws have been subject to much scholarly criticism for failing to comprehend and encourage a diversity of administrative practices tailored to specific policy contexts (cf. Cooper, 1988; Rohr, 1986).

10. For some insightful discussions of nonprofits and contracting, see Kramer (1994) and Ferris (1993). Also see Ott (2001) for an excellent collection of articles on the nature and problems of nonprofit organizations.

11. Rules tend to be minimalistic in three senses. First, their general character leads to an emphasis on minimum criteria for adherence sake. Second, they tend to emphasize negative more than positive criteria (i.e., they usually define more precisely what should not be done, and are usually vague

at best about what should be done). This fosters a strong tendency to regress behavior to the minimums. Third, because their criteria must apply to all persons or things falling under a law's classifications, the language of the law must usually be written for the lowest common denominator. For a broader discussion of the minimalism of rules-oriented decision making, see Norton (1991).

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