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.

¹Professor 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. Bolt of the Office of Administrative Law, who thoroughly disagreed with my conclusions, was unstinting in his assistance. Of course, responsibility for any errors that remain is mine.

²See generally Michael Asimow, Advice to the Public from Federal Administrative Agencies 11–19 (1973) (responsibility of government to furnish advice to diminish uncertainty).

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.* 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. Under the federal Administrative Procedure Act (APA), interpretive rules, policy statements, and procedural rules are exempt from any required procedure before or after adoption, although they must be published in the Federal Register if they have general applicability. While the Model State APA of 1961, on which numerous state APA's are based, contains no such exemptions, the states have mostly ignored its requirements of pre-adoption procedure for nonlegislative rules. 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.C.C. § 5090(a) (1988). Under this provision, the customary notice and comment procedure does not apply to "interpretive 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. § 555(c)(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. § 555(a). The APA uses the word "interpretive" but the author prefers the word "interpretative" for stylistic reasons. Both words are in common use.


9. Model State Administrative Procedure Act § 10-909 (cmt. 1981), 15 U.C.A. 1, 45 (1990) ("First, although the agencies in almost all states act in their daily practice as if interpretive 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 exception for interpretive rules.") ARTHUR E. BONHAM, STATE ADMINISTRA-
ibilities, 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 broadly18 and contained an exception for rules of internal management19 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 published. 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.


19. "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).

20. See infra notes 139–44.

21. 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 213–14 (arguing that the legislature should provide for these exceptions). The implications of this omission are discussed further infra note 128.

WINTER 1992 California Underground Regulations 47

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."22 Several early cases under the act found various techniques to avoid subjecting nonlegislative rules to the statutory regimen23 and its application to such rules was unclear.24

B. Armstead

The California Supreme Court's 1978 decision in Armstead v. State Personnel Board25 committed California to APA procedure for adoption of nonlegislative rules. The issue in Armstead 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-adoptive process and, consequently, the court declined to defer to it.

The unanimous decision in Armstead 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
decision deliberately rejected the federal model 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," 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 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.

The legislature explicitly sought to decrease the number of regulations as well as to improve their quality. The 1979 revision called for an accordingly 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. It must contain an evaluation of the benefits of small business, housing costs, costs to state or local government, preference for performance over prescriptive standards, 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; 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. It must identify each technical, theoretical, and empirical study or report on which the agency relies. If there is any change from the originally proposed regulation, the agency must reissue the regulation for an additional comment period of at least fifteen days. The information contained in the initial statement of reasons must be updated in the statement of reasons accompanying the final regulation.

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. No less than forty-five days after publication of the original notice, a public hearing must be held if any interested person requests one. 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. The statute carefully defines the record, requires the agency to index the record, and apparently makes

---

33. Id. §§ 11343(c), 11346.4(a)(3), 11346.53, 11346.7(a)(4), 11346.7(b)(5).
34. Id. §§ 11346.52, 55.
35. Id. §§ 11346.6(a)(5), (6), 11346.7(b)(3).
36. Id. §§ 11342.01, 11346.14(a), (b).
37. Id. §§ 11346.55(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, § 43 (1990). The fifteen-day notice provision applies only if the change was sufficiently related to the original notice 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.
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 comments on such material. Id. §§ 11346.7(b)(1), (2).
42. Id. § 11346.7(b)(5). This requirement is strongly enforced by OAL. See Marsha N. Cohen, Regulatory Reform: Assessing the California Plan, 1983 DURE L.J. 231, 249-51. Thus, in Department of Mental Health, Cal. Regulatory Notice Reg. No. 34-2, 1980, 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 on 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, created by the 1979 legislation to serve as an executive-branch watchdog on the rulemaking of almost all California agencies, 48 reviews rules for authority, clarity, consistency, reference, nonspecificity, and even for necessity 49 as well as for compliance with all of the elaborated notice, comment, and response requirements set forth in the statute. 50

46. Id. §§ 11346.8(d), 11347.7(c), 11500(b). See Bonfield, supra note 9, at 351-52; Cohen, supra note 42, at 253-54 (both criticizing the notion that the rulemaking file must be the exclusive record for judicial review purposes).

47. CAL. GOV'T CODE § 11500(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. §§ 11345-11345.11. The political rationale for the creation of OAL was the desire by the Democratic leadership of the legislature to fend off initiative provocations that would have created a legislative veto of regulations. The veto proposals were considered even more innovative than OAL regulation because of the risk that special interests in the legislature could synchronize the regulatory process. See Dan Walters, Regulating the Regulators: California's 'Right to Know', 2 CAL. L. REV. 718, 751 (1980).

49. CAL. GOV'T CODE § 11349.1 (West Supp. 1991). According to definitions in § 11349, "necessity" means the record of the rulemaking demonstrating 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 the statute, court decision, or other provision of law. "Reference" means the statute, court decision, or other provision of law which the agency implements, interprets or makes specific in the regulation. "Nonspecificity" 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 § 11349.1 (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 Standing Survey, CAL. REG. L. REP., Fall 1988, at 8 (reporting intense agency dissatisfaction with OAL); Cohen, supra note 42 at 256-77 (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.


In addition to reviewing all newly adopted regulations, OAL reviews an agency's declination to adopt a new emergency regulation or its revocation of an existing emergency regulation (in case of emergency, an agency can adopt a regulation without pre-adoption procedures but it must complete the entire process within 120 days after adopting the emergency rule unless

WINTER 1992 California Undergraduate Regulations 51

There are also provisions for a regulatory calendar, for required reports to the legislative authors of bills and to the committee 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 Undergraduate Regulations

In 1982, the legislature adopted Government Code section 11547.5(a), 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. 52

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.
and makes its determination available to the public and the courts. 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, the determination is judicially reviewable, and it can be utilized in court except in certain narrowly defined situations. 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.

To limit its caseload, OAL has created an exception to the application of the APA to nonlegislative rules. If a rule states the "only legally tenable interpretation" of the law, the agency can promulgate it without following APA procedures. There is some judicial support for this approach. 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 interpretation.

54. CAL. G0V'T CODE § 11347.5(b), (c) (West Supp. 1991). The OAL determination process is described in Herbert F. Bolt & Michael McNamer, Agency Rulemaking, in CALIFORNIA PUBLIC AGENCY PRACTICE §§ 20, at 29-33 to 29-44 (Gregory Ogden ed., 1991). I am informed that OAL originally opposed this extension of its jurisdiction and had to be pressured into action by the legislature.


56. CAL. G0V'T CODE § 11347.5(b) (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 in issue in the proceeding is whether the rule in question is a regulation as defined in the APA. Id. (emphasis added).

58. See, e.g., In re Request for Regulatory Determination filed by the Center for Public Interest Law, 1996 OAL Determination No. 5, at 9-12 (Aug. 15, 1996) ("fee" does not come under the exceptions 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. G0V'T CODE § 11347.5 (West Supp. 1991).


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, 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, 270 Cal. Rptr. 103, 110 (Cal. Ct. App. 1991) (internal memo, "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.")

WINTER 1992

California Underground Regulations

Moreover, this provision 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, 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 or that were articulated in press releases or in advice letters have been treated as invalidly adopted underground regulations.

A particularly controversial decision is Grier v. Kizer, 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 typical 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 of the regulations were mere restatements of existing law but that one portion went beyond it.


66. Wintzer & Kelly v. Department of Ind. Relations, 174 Cal. Rptr. 744 (Cal. Ct. App. 1981) (employer group requested guidance, agency responded in letters to one employer); In re Request for Regulatory Determination filed by Stephen Arias, 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 rely on CAL. GOV'T CODE § 11343(a)(3) (West Supp. 1991), which provides an exemption from filing (and thus from other provisions prescribed 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.

held that the staff instruction was a regulation under the APA 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 $654,4592 in overcharges that were discovered in the course of the audit.68

A similarly dramatic remedy was apparently employed in Wooley 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 independent invalid because of the failure to adopt it in accordance with the APA—or at least so the dissent read the majority opinion.71 Thus Wooley 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 § 11545.5(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 351-52. 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 consistent with 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 270, 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 method. Union of Am. Physicians & Dentists v. Kizer, 225 Cal. App. 3d 490, 502-06, 277 Cal. Rptr. 886, 893-95 (Cal. 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.


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


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, 1058-89, 266 Cal. Rptr. 385, 406-07 (Cal. Ct. App. 1990) (Ashby, J., dissenting).

WINTER 1992 California Underground Regulations 55

hearing has been granted by the California Supreme Court; because Wooley 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 subject to elaborate pre-adoption procedure clearly has had some beneficial effects. Agencies can suffer from a narrow mind-set and a lack of proper 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 the 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 uncontroversial 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 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.

75. Other than 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 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.
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 an 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 156, 188 Cal. Rptr. 150 (Cal. Ct. App. 1982) (OAL disapproval of emergency regulation for clasping prisoners) Westman v. Dunke, 51 Cal. App. 3d 935, 107 Cal. Rptr. 596 (Cal. Ct. App. 1975) (risk required). In addition, the emergency provision is not an exception to APA rulemaking procedure; it simply allows the rule to be adopted immediately. Therefore, 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 reduplication of the emergency regulation until the process can be completed. CAL. GOV’T CODE § 11346.1(b) (West 1980).
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 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 Div. of Health Servs., 149 Cal. App. 3d 1124, 197 Cal. Rptr. 294 (Cal. Ct. App. 1983) (internal staff memo reflects in individualized advice letters to public is invalid underground regulation); Winder & Kelly v. Department of Indus. Relations, 121 Cal. App. 3d 120, 174 Cal. Rptr. 74 (Cal. Ct. App. 1981) (agency's letter to individual firm, responding to request by employer group, that surveys 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).
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 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. 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. Somewhere, 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-

Govt. Code § 11342(b) (West 1980). Drafters of initiative measures have exempted their regulatory schemes from the APA. CAL. GOV’T CODE § 8880.20 (West Supp. 1991) (lottery); CAL. HEALTH & SAFETY CODE § 25249.8(e) (West Supp. 1991) (toxic chemicals specified in Proposition 65).

90. 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.

91. See supra text accompanying notes 59–62.

WINTER 1992 California Underground Regulations 61

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. 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, wait complaints, and issue determinations to the offending agency, but otherwise make no serious effort to root out the offending rules.

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

If cases like Wootley 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. 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."

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, a decisionmaker must constantly evaluate the net marginal costs and benefits of

93. See generally Administrative Law Review 48 (1990) for an account of why administrators are not under investigation by the state.

94. See supra text accompanying notes 67-69. In Union of American Physicians v. Regents of the University of California, 229 Cal. App. 3d 1001, 176 Cal. Rptr. 229 (Cal. Ct. App., 1984) (attorney fees to be considered under California's Civil Rights Act, supra note 88), it was held that the state was liable for

95. See generally Administrative Law Review 48 (1990) for an account of why administrators are not under investigation by the state.

96. See supra note 93, at 47. California's Civil Rights Act, supra note 88, for an account of why administrators are not under investigation by the state.

97. See generally Administrative Law Review 48 (1990) for an account of why administrators are not under investigation by the state.
Commission has responded to federal cases overturning its rules on the basis of inadequate consideration of alternatives by using adjudication instead. Yet rulemaking is 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 meddle 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 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 long-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 administrative 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. 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. Under the federal model, generally applicable interpretations and policies must be published. 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).

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. If an agency adopts a discretion-confining rule, it qualifies as a policy statement so long as it is tentative, not definitive. 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.

In close cases, there will always be difficulty in applying these categorical exceptions to the disorderly products produced by different sorts of agencies. However, most agency rules


105. See infra note 119.


109. Asimow, Nonlegislative Rulemaking, supra note 104, at 350-92. 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 unworkable. 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. Katz Metals Corp., 744 F.2d 1145 (5th Cir. 1984).

111. In any event, the existing California criteria are hardly free of difficult legal issues. See, for example, the recent cases in infra, that refuse to push existing law to its apparent limits. In addition, the "legally tentative" standard for interpretations creates many practical 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 underdca rule falls under the APA.

112. The 1981 Model State Administrative Procedure Act provides:

An agency need not follow the provisions of Sections 3-105 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.

113. 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.

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.

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 requires
courts to decide the validity of an interpretive rule wholly de novo and
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 enforce-
ment 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 that a court must defer to any reasonable agency interpretation of an ambiguous
For a persuasive argument that Chevron should not apply to an interpretive rule, see Harriett A.
Buchanan, Which Agency Interpretations Should Bind Citizens and Courts, 71 YALE L. J. 161
(applying that interpretive rules receive lower degree of deference than interpretations deriving from exercise of delegated lawmaking power).

118. See supra note 109.

119. The North Carolina statute defines “rule” broadly but makes an exception for
“interpretive statements concerning only the internal management . . . including policies and
procedures manuals, if such a procedure does not substantially affect the procedural or
substantive rights or duties of persons not employed by the agency . . . .” There are additional
exceptions for “[p]rohibiting 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
cases.” N.C. GEN. STAT. § 150B-2(b) (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 rule-
making 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.

...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 memos that set policy applicable only to its own employees
and that do not affect 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.

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
embodying an interpretative statement by the agency head or its designee, to the meaning of
a statute or other provision of law or, of a court decision, or of an agency order, including
where appropriate the agency’s current practice, procedure, or method of action based
up on that approach.

WASH. REV. CODE § 34.05.010(8) (1990).

122. “Policy statement” means a written description of the current approach of an agency
embodying a policy statement by the agency head or its designee, to the 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. 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 *Armstead* 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. 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. The rulings of some lower court cases are consistent with this approach. Any guidance documents that do not exercise delegated legislative power should not be considered quasi-legislative but instead should be treated as merely administrative.

In the past, the Supreme Court has often referred to quasi-legislative activity and (apart from *Armstead*), 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*.


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

The legislative history of the 1947 statute frequently used the word "quasi-legislative" but was unclear in defining it. Probably, the intended meaning was such regulations "have the force and effect of a law, so far as the Statute shall make us expressly (Emphasis added).

129. California cases have frequently recognized the distinction between legally binding regulations and other agency products that fail short of binding effect. See, e.g., Boiada v. Department of Alcoholic Beverage Control, 2 Cal. App. 3d 85, 86 P.2d 1, 14 Cal. Rptr. 115 (1970) (liquor licenses not bound by policy statement prohibiting tipless waitresses); Roth v. Department of Veterans Affairs, 110 Cal. App. 3d 622, 167 Cal. Rptr. 592 (Cal. App. 1980) (agency cannot impose late charges without adopting regulations).

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 forbids 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

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 rule-making, 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

---

130. See supra note 52.
131. See supra note 52.
133. See supra note 52.
134. See supra note 52.
135. See supra note 52.
136. See supra note 52.
137. See supra note 52.
138. See supra note 52.
139. See supra note 52.
agency's instructions to its own staff as internal management. For example, the *Grier* case 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.

Of course, instructions to staff could be used as a concealing way to impose a new legal obligation (or remove an existing obligation) on regulated parties. In such cases, 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. 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 regulations 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 one. Of the grounds for that decision was that the regulations constituted steps in the performance of a statutory duty, rather than acts

5. Strengthen the "Only Tenable Interpretation" Exception

As mentioned earlier, OAL has established an exception from the broad definition of "regulation" in the APA. 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. 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. However, this seems incorrect. Section 11343(a)(3) of the California Government Code excludes from filing requirements (and thus from other procedures) a regulation that "directed to a specifically named person or to a group of persons and does not apply generally throughout the state." 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

---

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.
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 Wonsley\(^{153}\) are inappropriate. Of course, if an agency has not validly adopted a legislative rule, persons apparently subject to it are not bound by it.\(^{159}\) 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.\(^{165}\) Thus, as occurred in Armitstead, 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 Wonsley.

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.

151. See supra text accompanying notes 69-71.
152. See cases cited supra note 126.