Soft Institutional Design

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Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, U. Mich. Pub. L. Res. Paper No. 353 (September 9, 2013), available at SSRN.

Margo Schlanger is a law professor at Michigan well-known for her work on prisons, structural reform litigation, and civil liberties, but not (yet) on administrative law as such. Perhaps for precisely that reason, she has given us here a novel, plausible and important account of a new species of administrative institution, one that administrative lawyers have heretofore failed to describe in general terms. A "new" species not in the sense that the species is new to the world, of course, but in the sense that it is newly identified by theory. Field zoologists discover species or traits of species that complicate or overturn established theoretical taxonomies; W.H. Caldwell famously proved that the platypus is a mammal that nonetheless lays eggs ("monotremes oviparous, ovum meroblastic"—so ran the immortal telegram). Likewise, field research on institutional design in the wild often does more for the progress of knowledge than a dozen nth-decimal refinements on whiteboard models of administrative interaction.

The novel institutional form here is the "Office of Goodness," an office embedded within a larger agency and tasked with promoting or enforcing an extrinsic value that is orthogonal to the agency's mission, or even one that constrains the agency's mission. Schlanger headed the Office of Civil Rights and Civil Liberties embedded within the Department of Homeland Security from 2010 to 2012, and she draws upon her personal experiences with the effort to temper the imperatives of security by a measure of attention to liberty and security. But there are no war stories here, only informed illustrations of the larger theme. And Schlanger identifies similar offices from elsewhere in the government.

The striking feature of Offices of Goodness is that they typically lack operational legal authority over the host agency's decisions, in any hard sense. Although Offices of Goodness may have power to delay or clear decisions, their officers are generally empowered to consult, to advise, or to report to outside third parties, but not to dictate or countermand operational decisions. Even so, Schlanger convincingly documents through case studies that Offices of Goodness can really wield "influence without authority." Just as we now understand that there is such a thing as "soft law," which accomplishes its ends through non-coercive mechanisms of signaling, coordination and information, so too there is such a thing as soft institutional design that gives power to agents indirectly. Rather than granting them rights and powers of legal control, soft institutional design works through mechanisms of participation in group decision-making, agenda-setting, and the ability of actors committed to Goodness to pull fire alarms that outside actors will hear. Agencies that do not want the fire alarm to go off will then anticipate or accommodate objections based on Goodness.

Schlanger is alert to the standing risk that Offices of Goodness will be co-opted or neutered by mission-oriented administrators or by principals in Congress or the White House, who may want political credit for promoting Goodness but don't want Goodness offices with real teeth. Those risks are real, and she is right to be worried about them (assuming, of course, that one shares whatever conception of Goodness underpins whatever Office is at issue in a given case. Nothing in Schlanger's institutional analysis depends one iota on any particular substantive conception of Goodness). Yet reading her case studies, one is struck not so much by the fragility of Goodness as by its power—by the sheer surprising power of awarding Goodness a seat at the table, wherever that table may happen to be.

Recent work in psychology has underscored the scarcity of cognitive resources and the resulting limits of attention at the individual level. All decisions and choices are made subject to limited time, limited information, and the limited processing capability of the brain. At the group level, there are equally sharp limits to institutional attention, emphasized by Herbert Simon and many others. Those limits imply that values extrinsic to the agency's ordinary mission, or even constraints on the agency's mission, may often be slighted not out of malice or bad faith, but just because no one thinks about them. Merely putting a representative of Goodness in the room and at the table to raise the relevant issues, to steer the group's attention in certain directions, may produce outsize effects even if those representatives have no coercive power whatsoever. Neglect is one of the parents of bad government, and Offices of Goodness may ameliorate neglect even if they are helpless in the face of willful and deliberate abuse.

Schlanger has given us one of very few treatments of soft institutional design — perhaps the very first, depending whether one thinks that earlier papers on privacy offices and inspectors-general properly belong in the same category, or instead raise somewhat distinct issues. In any event, those papers did not abstract from the particulars. Schlanger has thus gone well beyond the earlier efforts by generalizing her analysis to the level of species-identification. The result is a memorable contribution to the institutional design of the administrative state.

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