Agency in State Agencies

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The democratic state is an administrative state. It is often portrayed, for convenience, as a legislature, a court, or a chief executive. But the actual work of representative governance is done primarily in administrative agencies, which interpret and implement the often vague ambitions inscribed in statutes. Agencies translate legislative pronouncements into rules that set standards and regulate conduct; investigate and ensure compliance; adjudicate disputes and prosecute violators. Agencies, in short, both interpret and implement the laws that legislatures pass. Whether we are interested in consolidated sovereignty or diffuse pathways of power, it is administrative agencies that enact much of the state’s effect in the world. When we talk about agency in the state, then, we must primarily be talking about agency in agencies.

That may seem odd. Bureaucracy seems like the absence of agency: just mechanistic gear-grinding continuing things begun by other, distant, powerful actors. Where can agency find a foothold amid the faceless people, the featureless buildings, the infinite red tape, the endless unread files? Few have captured this un-agency more grippingly than Hannah Arendt (1994), who shows in consternating detail how bureaucracy melts individuals into a mass, subordinating them to an unstoppable process set in motion by others elsewhere—actual agents—and negating their accountability for even their most extreme acts. In bureaucratese, the things that happen happen in the passive voice.

Here there is no room for conduct that creates, starting off the uncontrollable iterations of response and reinterpretation that characterizes true political action (Arendt 1958). It would be a travesty to conflate the agonistic, agentive sphere of politics, where any answer is always subject to further contestation, with that of administration, which reduces human activity to a striving for smooth functioning and conclusive answers (Honig 1993).

So, another oddity: administrations has world-changing effects, yet seems bereft of agents. Infuriatingly—yet conveniently—bureaucracy appears as an undifferentiated entity exerting power that cannot be held to account. It is the decider’s enforcer: an implementing thug who carries out orders but lacks any creative abilities of his own.

This common image, it turns out, distorts our understanding of both agencies and agency. It conceals the complex distribution of possibility and responsibility within bureaucracy, which involves individual subjectivities, interpersonal relations, and socially structured decisionmaking (Blau 1963; Bernstein 2008). And it obscures the varied ways that accountability for bureaucratic action is structured by different social arenas allow. What kind of accountability is available, it turns out, depends on the position from which one does

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1 Recent historical work shows that this was the case even in the early United States, generally considered a latecomer to the administrative game (Mashaw 2012).
the accounting. Here, I unpack one administrative process to show how units of agency emerge and blend in the ongoing process of differentiation and subsumption that characterizes bureaucratic action. I then explain how one particular social arena—litigation—provides a scaffolding for bureaucratic accountability that, like all scaffoldings, both enables and constrains.

Bureaucracy’s complex distribution of agency and the legal scaffoldings for its accountability have two linked implications. One, bureaucracy may be a paradigmatic case of distributed agency. If we conceive of agency not as a heroic individual exerting power over others, but as an always interdependent social activity, then bureaucracy’s subsumption of individual impulses in mass results looks less like agency’s nemesis and more like its instantiation. Rather than seeing agency in agencies as an oddity, then, we may see in it an oddly forthright presentation of the nature of agency itself.

Two, identifying legal scaffoldings that enable and constrain bureaucratic accountability suggests that accountability is perspectival not only in agencies, but in general. Whether accountability is available, and what it looks like when it is, depends not on some underlying relation between actor and action, but on the scaffoldings that structure the interpretation of action in particular social arenas. Understanding accountability scaffoldings in particular social realms is thus central to understanding the nature of accountability generally. Indeed, it may be more accurate not to speak of accountability generally, but only of local tropes of accountability.

Varying, and Valuing, Distribution

American administrative agencies are bewilderingly variegated in their mandates, their hierarchical structures, and their operational traditions. Among the most important, and most opaque, things agencies do is to implement the statutes that legislatures pass. They do so largely through rules of conduct that have legally binding force. In the United States, the Administrative Procedure Act and the legal cases interpreting it lay out the public face of this rulemaking power. An agency charged with implementing a statute solicits public comments on a proposed rule and then publishes a final rule, which responds to significant comments, justifies significant choices, and sets out constraints on conduct by those under its purview.

Beyond those constraints, the internal process is up to the people who run the agency. One brief example can demonstrate how different social units—sub-individual, individual, group—emerge and recede as agents at different stages of a bureaucratic process. In the Environmental Protection Agency (EPA), mid-level administrators may convene “workgroups” of scientists, engineers, economists, policy analysis, lawyers, enforcement officers, and political negotiators to develop a regulation. Colleagues from the initiating office gather information and draft primary documents, but workgroups use their range of expertise and perspective to analyze the evidence, design the rule, and resolve conflicts.

Workgroup conveners are advised to avoid “bastards”—participants who pursue goals and grind axes unrelated to the rule production, thereby delaying or derailing the process (McGarity 1991:17). After higher-level administrators allow the proposed rule to be published and public comments have been received, individual administrators respond to comments about the parts of the rule they drafted. The convener submits these responses, workgroup recommendations for the final rule, and dissents from those recommendations to
higher-level administrators, who resolve remaining conflicts before approving the final rule (1991).

Thus, what appears in public as a monologic pronouncement by an undifferentiated organization emerges from ongoing social relations and iterative interactions that both individuate and collectivize human action (Hull 2012). The external world that provides the evidence on which administrators base their rules influences regulatory developments (Bernstein 2015). Particular contributions are attributable to human individuals as they take positions within the workgroup. That individuation is largely erased as the groups reach compromise positions. But the erasure is not complete, since unresolved conflicts move up for resolution at higher levels. The notice of proposed rulemaking briefly presents the proposal as a univocal, undifferentiated text addressed to the public. But it is promptly disaggregated again as administrators respond to comments on the particular pieces of the rule they drafted, and workgroup members stake out positions on emerging conflicts. Those specificities are then gradually erased again as higher-level administrators resolve those conflicts, leading to the final rule—another seemingly univocal text.

Individual contributions thus appear, meld into a mass, and become re-articulated at different stages of the process in ways visible differently to differently situated observers. For a private party, the proposed rule appears to have been produced by the agency as a whole. Agency employees who craft the rule and respond to comments, in contrast, see their colleagues' individual contributions. But neither of these is the only, or the real, agent. Each individual’s actions have effects in the world, but only insofar as they pass through the congealing process that undifferentiates them into collective action. At the same time, the collective could not act absent each individual’s contributions, which influence the final product. What emerges in public view, naturally, are only the final products of internal differentiation. The image of bureaucracy as an impenetrable morass may thus owe something to bureaucracy’s self-presentation in public products—and to observers’ sometimes gullible acceptance of it.

Within the agency, similarly, individuals are ascribed professional competencies and characterological proclivities—scientists, bastards—yet also treated as a collective mass—the workgroup. Not quite the ideal arena of Weberian interchangeability, actual bureaucracies take into account how individuals, with backgrounds and personalities, contribute to or detract from collective action. Yet this also highlights the enduring interdependence of bureaucratic actors, whose individual contributions are irrelevant, uninterpretable, unimplementable without the whole that subsumes them.

This inherent interdependence frustrates both participants and theorists of bureaucracy. Yet interdependence is in the very nature, not just of bureaucracy, but of agency itself. The idea that agencies’ agency is undifferentiated masks internal complexity in much the same way as the idea that individuals’ agency is indivisible. Bureaucracy, thus, may provide a viable image of how agency works generally—an image that is unusually forthcoming about its distributed nature, building the interdependence of action not only into how it works, but also into what it values.

**Structuring Accountability**
Who is responsible for agency action? It depends who’s asking, and in what way. One very visible way American society assigns accountability for agency action is through litigation. Litigation is not the only route to accountability, of course. On the contrary, it shows how particular, and peculiar, the scaffoldings for accountability in different realms may be. In litigation, the legal status of the action at issue—not the proximal actor or decision-maker—determines who may be accountable and how.

For instance, you can sue a federal employee who violates your rights under the United States Constitution. If you win, the court assigns the defendant responsibility for harming you and, usually, requires that defendant to pay you money. Such “constitutional tort” lawsuits allow for one particular kind of accountability. It is textually bounded: constitutional tort lawsuits can only assign responsibility for violations of rights guaranteed by the federal Constitution. It is backwards-looking and restitutionary, assigning blame and monetary compensation for past action. And it is individualistic. While the conduct at issue in a constitutional tort lawsuit may arise from agency policy, the litigation can target only individuals, not agencies. Constitutional tort lawsuits enable accountability only for individuals who personally undertake an unconstitutional act, not for the bureaucratic structures underlying their decision to do so.

You can also sue a federal employee who harms you in some more ordinary way, such as by destroying your property, under the Federal Tort Claims Act (FTCA). The FTCA also structures a backwards-looking and restitutionary accountability, providing money damages for past action. It provides accountability only for the universe of actions the statute specifies: torts for which private parties would be liable. But in contrast to constitutional tort lawsuits, accountability under the FTCA is collective, not individualistic: the government is the only defendant available. If you sue an individual government employee under the FTCA, courts will substitute the United States as defendant.

Finally, you can challenge an agency’s rule under the Administrative Procedure Act (APA), which allows lawsuits “seeking relief other than money damages.” By prohibiting monetary restitution for past action, the APA provides scaffolding for a future-oriented accountability: courts do not punish agencies for passing bad rules, but can prevent an existing rule from having further effects. APA lawsuits hold neither individuals nor the government as a whole to account, but the agency itself: its accountability is limited to acts taken in the name of, and held out to represent, the agency. And the consequences it imposes adhere not to an individual person but to a bureaucratic position. The court’s judgment addresses whoever leads the agency, whether or not that person had anything to do with the offending rule. Thus the APA’s accountability treats the agency as a unitary organism that endures through time irrespective of personnel.

These three legal regimes allow for the construction of accountabilities with different temporal orientations; different consequences; and different units of responsibility. These differences depend neither on the closeness of the actor to the act, nor on the act’s organizational complexity. Rather, they depend on how the conduct at issue looks from the perspective of each particular legal regime: constitutional law, tort law, administrative law.

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2 The doctrine of sovereign immunity prevents governments from being sued without their consent. The FTCA provides this consent for the circumstances it encompasses.
Litigation channels legally distinguishable acts into separate structures that define the kinds of legal accountability that can be constructed for them.

This legal accountability enabled by litigation, of course, covers neither all acts undertaken by or in agencies, nor all the forms of accountability available for any particular act. One version of accountability, of course, is conspicuously missing: this regime provides no way to reward the exercise of agency in agencies, only to punish or limit it. Litigation, of course, only works in one direction. But one can hypothesize that accountability scaffoldings will always be constructed with a particular slant. Other social arenas will have their own ways to channel, define, and delimit the accountabilities they enable.

Within the agency, for instance, workgroup members can construct accountabilities that hinge not on the legal status of their acts but on other values and forms of judgment. They may hold one another responsible for the quality of their contributions or their positions in a conflict. Superiors, in turn, will have different avenues for constructing accountability. And so on out. Legislators may publicly impose well-known kinds of political accountabilities based in political values removed from both legal status, group contribution, and job description. Historians may use altogether different structures to attribute accountability. Who is accountable for agency action, and how they can be held to account, depends on the position from which that accounting is done. Different social arenas offer different scaffoldings for constructing accountability, giving accountability different parameters, consequences, and meanings.

Just as the distributed nature of bureaucratic agency may illuminate a broader characteristic of agency in general, the perspectival nature of bureaucratic accountability may have something to say about accountability elsewhere. Insofar as accountability depends on an attribution of responsibility, what it looks like may always depend on the local structures that make such attributions comprehensible and effective——the social conditions that render a particular attribution of responsibility felicitous (Austin 1962). My brief sketch suggests that even the relatively tightly clustered social realm of litigation provides different scaffoldings that serve as conditions of possibility for, as well as limits on, legal accountability. Such scaffoldings for accountability do not simply allow accountability to be recognized. They allow it to be created in the first place.

references


