

Sludge and Ordeals

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Abstract

In 2015, the United States government imposed 9.78 billion hours of paperwork burdens on the American people. Many of these hours are best categorized as “sludge,” reducing access to important licenses, programs, and benefits. Because of the sheer costs of sludge, rational people are effectively denied life-changing goods and services; the problem is compounded by the existence of behavioral biases, including inertia, present bias, and unrealistic optimism. In principle, a serious deregulatory effort should be undertaken to reduce sludge, through automatic enrollment, greatly simplified forms, and reminders. At the same time, sludge can promote legitimate goals. First, it can protect program integrity, which means that policymakers might have to make difficult tradeoffs between (1) granting benefits to people who are not entitled to them and (2) denying benefits to people who are entitled to them. Second, it can overcome impulsivity, recklessness, and self-control problems. Third, it can prevent intrusions on privacy. Fourth, it can serve as a rationing device, ensuring that benefits go to people who most need them. In most cases, these defenses of sludge turn out to be more attractive in principle than in practice. For sludge, a form of cost-benefit analysis is essential, and it will often argue in favor of a neglected form of deregulation: sludge reduction. For both public and private institutions, “Sludge Audits” should become routine. Various suggestions are offered for new action by the Office of Information and Regulatory Affairs, which oversees the Paperwork Reduction Act; for courts; and for Congress.

I. 9.78 Hours

Enacted in 1979, the Paperwork Reduction Act (PRA)¹ was meant as a deregulatory statute. It was designed to minimize the paperwork burden imposed on the American people, and to maximize the benefit of the information obtained. Its key provision² states:

With respect to the collection of information and the control of paperwork, the Director [of the Office of Management and Budget] shall--

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¹ [44 U.S.C. §§ 3501–3521](#)

² 44 U.S.C. § 3504(c)

- (1) review and approve proposed agency collections of information;
- (2) coordinate the review of the collection of information associated with Federal procurement and acquisition by the Office of Information and Regulatory Affairs with the Office of Federal Procurement Policy, with particular emphasis on applying information technology to improve the efficiency and effectiveness of Federal procurement, acquisition and payment, and to reduce information collection burdens on the public;
- (3) *minimize the Federal information collection burden, with particular emphasis on those individuals and entities most adversely affected;*
- (4) *maximize the practical utility of and public benefit from information collected by or for the Federal Government;* and
- (5) establish and oversee standards and guidelines by which agencies are to estimate the burden to comply with a proposed collection of information.

For present purposes, the most important provisions are the italicized (3) and (4). The word “minimize” suggests that paperwork burdens should be no greater than necessary to promote the agency’s goals. The central idea seems to be one of *cost-effectiveness*: as between two approaches to promoting those goals, the least burdensome must be chosen.³ Taking the word “minimize” together with the phrase “maximize the practical utility and public benefit,” we can plausibly understand the PRA to suggest a kind of cost-benefit test as well: *The costs of paperwork burdens must justify their benefits.*⁴ And yet there is no systematic effort, to date, to see which burdens pass that test. Nor is there an opportunity for judicial review of arbitrary or capricious information collections: If an agency is imposing a highly burdensome information collection without good reason, courts appear to be unavailable, notwithstanding the general rule in favor of review for arbitrariness.⁵

All this creates serious problems. The idea of “deregulation” is generally taken to refer to the elimination of the kinds of burdens imposed through notice-and-comment rulemaking, as through the repeal of rules on the books.⁶ Elimination of paperwork is not standardly included as “deregulation.”⁷ But in view of its costs, material and otherwise, paperwork reduction should be considered a high priority. Over the last decades, the United States has experienced a cost-benefit

³ For discussion of some of the complexities, see Marte Gold et al., *Cost-Effectiveness in Health and Medicine* (1996).

⁴ On some of the challenges here, see *infra*.

⁵ See *infra*.

⁶ See, e.g., Paul Jaskow and Richard Schmalensee, *Markets for Power: An Analysis of Electrical Utility Deregulation* (1988); Cass R. Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 *Supreme Court Review* 177.

⁷ For efforts to deregulate in this way, see OIRA Memorandum on Reducing Reporting and Paperwork Burdens (June 22, 2012), <https://www.dol.gov/sites/default/files/oira-reducing-rep-paperwork-burdens-2012.pdf> (providing direction to agencies consistent with the PRA and Executive Order 13610, *Identifying and Reducing Regulatory Burdens*); OIRA Memorandum on Testing and Simplifying Federal Forms (Aug. 22, 2012), <https://obamawhitehouse.archives.gov/sites/default/files/omb/infoereg/memos/testing-and-simplifying-federal-forms.pdf>

revolution, in which the benefits of regulations are generally required to justify their costs.⁸ To a significant extent, the revolution has bypassed paperwork burdens. This is a major omission. Whenever the government imposes such burdens, it should ask the cost-benefit question; it should ask distributional questions as well.⁹

The PRA requires the Office of Management and Budget to produce an annual report, called the Information Collection Budget (ICB) of the United States Government.¹⁰ The ICB quantifies the annual paperwork burden that the U.S. government imposes on its citizens. The most recent report finds that in 2015, Americans spent 9.78 billion hours on federal paperwork.¹¹ That number is unusually high, but in spite of significant shifts, the number of hours has been high over time:

Figure 1: Total Estimated Paperwork Burden Hours (FY 2004 to FY 2015)⁸



It is worth pausing over those 9.78 billion hours. Suppose that we assembled every resident of Chicago, and insisted that for the entirety of 2019, each one must work 40 hours a week, engaged in just one task: filling out federal forms. By the end of 2019, the 2.7 million citizens of Chicago

⁸ See Cass R. Sunstein, *The Cost-Benefit Revolution* (2018).

⁹ See *infra*.

¹⁰ 44 U.S.C. § 3514(a)

¹¹ Office of Management and Budget, *Information Collection Budget of the United States Government* (2016), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/icb/icb_2016.pdf. Puzzlingly, the Trump administration has failed to produce the annual report, required though it is by law.

will not have come within four billion hours of the annual paperwork burden placed on Americans.

The 9.78 billion hours take a significant toll.¹² The Office of Information and Regulatory Affairs has not attempted to monetize those hours, though in 2010, it asked for public comments on whether and how to do so.¹³ If we value an hour of work at \$20,¹⁴ we are speaking of the equivalent of \$195.6 billion -- more than double the budget of the Department of State¹⁵ and the Department of Transportation,¹⁶ about triple the budget of the Department of Education,¹⁷ and about eight times the budget of the Department of Energy.¹⁸ The monetary figures greatly understate the problem. Administrative burdens can make it difficult or impossible for people to enjoy fundamental rights, to obtain licenses and permits, to obtain life-changing benefits, or to avoid crushing hardship.¹⁹ With respect to the right to choose abortion, such burdens can be decisive impediments.²⁰ They can also make it difficult for people to receive the Earned Income Tax Credit, which is one of the most beneficial antipoverty programs.²¹

For such burdens, Richard Thaler has coined a helpful term: “sludge.”²² The term should be taken to refer to a kind of friction, large or small, that people face when they want to go in one or another direction.²³ People might want to cancel a subscription to a magazine in which they

¹² Regrettably, the Information Collection Budget does not make a distinction between voluntary and involuntary information collections. It is clear, however, that the vast majority are involuntary. For a clue: The Department of Treasury, mostly through the Internal Revenue Service, accounts for over half of the total, and compliance with its information collections is not voluntary.

¹³ See Request for Comments on Implementation of the Paperwork Reduction Act, 74 Fed. Reg. 55269 (Oct. 27, 2009) I served as Administrator of the Office of Information and Regulatory Affairs at the time. OMB and OIRA asked similar questions in 1999. See Notice of Reevaluation of OMB Guidance On Estimating Paperwork Burden, 64 Fed. Reg. 55788 (Oct. 14, 1999). For a valuable relevant discussion, see Adam M. Samaha, Death and Paperwork Reduction, 65 *Duke Law Journal* 279-344 (2015).

¹⁴ The federal government does not have a standard number, but in Regulatory Impact Analyses, it has used numbers from the Bureau of Labor Statistics, which reports an average in the vicinity of \$27. See e.g., Dep’t of Health and Human Services & Food and Drug Admin., Tobacco Product Standard for N-Nitrosornicotine Level in Finished Smokeless Tobacco Products, FDA-2016-N-2527 at 78 (Jan. 2017), <https://www.fda.gov/downloads/aboutfda/reportsmanualsforms/reports/economicanalyses/ucm537872.pdf>.

Samaha, supra note, is an excellent, illuminating treatment.

¹⁵ Department of State, Congressional Budget Justification (2018), <https://www.state.gov/documents/organization/277155.pdf> (FY19 request of \$37.8 billion)

¹⁶ Dept. of Transp., Budget Highlights Fiscal Year 2019 (2018), <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304476/508dotbh2019-b.pdf> (FY19 request of \$76.5b)

¹⁷ Dept. of Educ., Fact Sheet: President Trump’s FY 2019 Budget (2018), <https://www2.ed.gov/about/overview/budget/budget19/budget-factsheet.pdf63b> (FY19 request of \$63.2b)

¹⁸ Dept. of Energy, FY 2019 Budget Fact Sheet, (2018), <https://www.energy.gov/sites/prod/files/2018/02/f48/DOE-FY2019-Budget-Fact-Sheet.pdf> (FY19 request of \$30b).

¹⁹ See Pamela Herd and Donald Moynihan, Administrative Burden: Policymaking by Other Means (forthcoming 2018); Elizabeth Emens, Admin, 103 *Geo L.J.* 1409 (2015); Elizabeth Emens, Life Admin (forthcoming 2019).

²⁰ Herd and Moynihan, supra note.

²¹ Id.

²² Richard H. Thaler, Nudge, Not Sludge, 361 *Science* 431 (2018).

²³ I am bracketing here the precise relationship between nudge and sludge. It should be clear that nudges can be for good or for bad; on the bad, see George Akerlof and Robert Shiller, *Phishing for Phools* (2017). It should also be

no longer have the slightest interest, but to do that, they might have to wade through a great deal of sludge.²⁴ People might want to sign their child up for free school meals, but the sludge might defeat them.²⁵ To obtain financial aid for college, students are required to fill out the Free Application for Federal Student Aid (FAFSA).²⁶ It is long and complicated, and it requires young people to provide information that they might not have (some of it is on their parents' tax returns).²⁷ Many students give up.²⁸ The right to vote may be the most fundamental of all. But if the registration process is full of sludge, a lot of people might end up disenfranchised.²⁹

Reducing administrative burdens can have a large impact on people's lives.³⁰ For free school meals, the U.S. Department of Agriculture has adopted a "direct certification" program, which means that parents do not have to take the trouble to enroll their children at all.³¹ If the school district has enough information to know that they are eligible, they are automatically enrolled.³² In the 2014-2015 school year, more than 11 million children benefited from the program (about 91 percent of the eligible population).³³ Simplification of the FAFSA

clear that sludge can be for good or for bad. It is reasonable to see sludge as a kind of nudge; friction can nudge people in a helpful or unhelpful way. If people are nudged chose healthy over unhealthy food, through good choice architecture, they might face sludge when they seek unhealthy food. To be sure, more work remains to be done on definitional issues. My hope is that the examples will be sufficient for purposes of the current discussion.

²⁴ For example, Citizens Advice, a network of independent charities helping consumers throughout the U.K., performed an analysis of cases and found that in just three months consumers paid an average of £160 towards unwanted subscriptions for gym memberships, television, insurance and online streaming services, and during that *time 9 in 10 consumers were initially refused by the company when they tried to cancel their subscription*. Press Release, Citizens Advice, Citizens Advice Reveals Consumers Spend An Average of £160 on Unwanted Subscriptions During National Consumer Week (Nov. 27, 2017), <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/citizens-advice-reveals-consumers-spend-an-average-of-160-on-unwanted-subscriptions-during-national-consumer-week/>.

²⁵ A corrective is the direct certification program, discussed below. See U.S. DEP'T OF AGRIC., CN-15-DC, DIRECT CERTIFICATION IN THE NATIONAL SCHOOL LUNCH PROGRAM: STATE IMPLEMENTATION PROGRESS, SCHOOL YEAR 2014–2015 (2015), available at

<https://www.fns.usda.gov/direct-certification-national-school-lunch-program-report-congress-state-implementation-progress-0>

²⁶ See Eric Bettinger et al., *The Role of Simplification and Information in College Decisions: Results from the H&R Block FAFSA Experiment*, 2 (2009), available at <https://www.nber.org/papers/w15361>

²⁷ See Susan Dynarski and Mark Wiederspan, *Student Aid Simplification: Looking Back and Looking Ahead* (2012), available at <https://www.nber.org/papers/w17834>

²⁸ *Id.*

²⁹ See, e.g., Herd and Moynihan, *supra* note; <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf>; Brater et al., *Purges: A Growing Threat to the Right to Vote* (June 20, 2018) <http://www.brennancenter.org/publication/purges-growing-threat-right-vote>, The Leadership Conference Education Fund, *The Great Poll Closure* (Nov. 2016) <http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf>.

³⁰ See U.S. Customs and Border Protection, Secretary Napolitano Announces Final Rule for Permanent Global Entry Program (Feb. 6, 2012) available at <https://www.cbp.gov/newsroom/national-media-release/secretary-napolitano-announces-final-rule-permanent-global-entry>. The program now has five million members. U.S. Customs and Border Protection, *CBP Announces 5 Million Global Entry Members* (Apr. 2018), available at <https://www.cbp.gov/newsroom/national-media-release/cbp-announces-5-million-global-entry-members>

³¹ See *supra* <https://www.fns.usda.gov/direct-certification-national-school-lunch-program-report-congress-state-implementation-progress-0>

³² *Id.* at 4.

³³ *Id.* at 15, 24.

dramatically increases the likelihood that low-income people will apply for aid – and eventually enroll in college.³⁴ A number of states have adopted automatic voter registration, which means that if eligible citizens interact with a state agency (say, by receiving a driver’s license), they are registered as voters.³⁵ In less than a year, Oregon’s automatic registration program produced more than 250,000 new voters, and almost 100,000 of them actually voted.³⁶ The private sector can do a great deal more to reduce sludge – to help workers choosing among health care plans, to make life easier for consumers with ideas or complaints, to help people to avoid serious risks.³⁷

II. Why Sludge Matters

Why does sludge matter? Let us begin with the assumption that people are fully rational and that in deciding whether to navigate forms, they make some calculation about costs and benefits. Even if so, the relevant costs might prove overwhelming. It might be very difficult to get past the sludge, perhaps because people do not have essential information. In some cases, doing the relevant paperwork might be literally impossible. It might not be feasible for people to fill out the forms. By itself, these points help explain low take-up rates for many federal and state programs,³⁸ and the immense difficulty that people often have in obtaining permits or licenses of various sorts.³⁹

A. Biases and Sludge

³⁴ See supra at 19. <https://www.nber.org/papers/w17834>; <https://www.nber.org/papers/w15361>

³⁵ Brennan Ctr. For Just., Automatic Voter Registration (2018),

<https://www.brennancenter.org/analysis/automatic-voter-registration>. As of 2018, thirteen states and the District of Columbia have approved automatic voter registration policies. These states are: Alaska, California, Colorado, Georgia, Illinois, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, Washington, and West Virginia). Brennan Ctr. For Just., History of AVR & Implementation Dates (2018), <https://www.brennancenter.org/analysis/history-avr-implementation-dates>.

³⁶ ROB GRIFFIN ET AL., WHO VOTES WITH AUTOMATIC VOTER REGISTRATION? IMPACT ANALYSIS OF OREGON’S FIRST-IN-THE-NATION PROGRAM (2017), <https://www.americanprogress.org/issues/democracy/reports/2017/06/07/433677/votes-automatic-voter-registration/#fn-433677-2>.

³⁷ For valuable discussion, see Elizabeth Emens, Life Admin (forthcoming 2019). In the health care context, see George Loewenstein et al., A behavioral blueprint for improving health care policy. *Behavioral Science & Policy*, 3(1), 53–66 (2017).

³⁸ See Janet Currie, “The Take up of Social Benefits.” *The Institute for the Study of Labor in Bonn, Discussion Paper No. 1103*, (2004) at 11-2; Carole Gresenz et al., “Take-Up of Public Insurance and Crowd-Out of Private Insurance under Recent CHIP Expansions to Higher Income Children,” 47 *Health Serv. Res.* 1999 (2012); Saurabh Bhargava and Dayanand Manoli, “Improving Take-Up of Tax Benefits in the United States” *The Poverty Action Lab* (2015), available at <https://www.povertyactionlab.org/evaluation/improving-take-tax-benefits-united-states>; Katherine Baicker et al., “Health Insurance Coverage and Take-Up: Lessons from Behavioral Economics,” 90 *The Millbank Quarterly* 107 (2012).

³⁹ Regulatory Reform Team, Case Study: Chicago Licensing and Permitting Reform, (2015), available at <https://datasmart.ash.harvard.edu/news/article/case-study-chicago-licensing-and-permitting-reform-647> (assessing the regulatory landscape of the city of Chicago, and finding, among other things, that “[a]pproximately 17% of zoning licenses were not being processed and sent back due to insufficient information.”)

An assortment of human biases, emphasized by behavioral economists, amplify the real-world effects of administrative burdens. For many people, inertia is a powerful force,⁴⁰ and people tend to procrastinate.⁴¹ If people suffer from inertia and if they procrastinate, they might never do the necessary paperwork. The problem is compounded by “present bias.”⁴² The future often seems like a foreign country – Laterland – and people are not sure that they will ever visit. It is often tempting to put off administrative burdens until another day. That day may never come, even if the consequences of delay are quite serious.

Mail-in forms impose a form of sludge.⁴³ They provide people with an opportunity to obtain a nontrivial gain, often in the form of a check, but they require people to overcome inertia. As an illustration of the relationship between behavioral biases and sludge, consider a study of people’s failure to redeem such forms, with a memorably precise name: *Everyone Believes In Redemption*.⁴⁴ Across various markets, redemption rates usually range between 10 percent and 40 percent – which means that a strong majority of customers forget or simply do not bother.⁴⁵ Because of the power of inertia, that might not be terribly surprising. What is more striking is that the finding that *people are unrealistically optimistic about the likelihood that they will ever redeem forms*.⁴⁶ In the relevant study, people thought that it was about 80 percent likely that they would do so within the 30 days they were given.⁴⁷ The actual redemption rate was 31 percent.⁴⁸ It is an overstatement to say that everyone believes in redemption. But most people certainly do.

In the same study, the researchers made three efforts (with different groups of people) to reduce the massive difference between the predicted and actual redemption rates. First, they informed participants, very clearly, that in previous groups with similar people, redemption rates were below one-third.⁴⁹ Second, they issued two clear reminders – soon after purchase and again when the deadline for redemption was rapidly approaching.⁵⁰ Third, they made redemption far simpler, by eliminating the requirement that people must print out and sign a certification page.⁵¹

As it turned out, not one of the three of the interventions reduced people’s optimism. In all conditions, people thought it about 80 percent likely that they would mail in the forms.⁵² Moreover, and somewhat surprisingly, the first two interventions had no effect on what people

⁴⁰ Brigitte C. Madrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q J Econ 1149, 1184 (2001); John Pottow and Omri Ben-Shahar, *On the Stickiness of Default Rules*, 33 Fla State U L Rev 651 (2006).

⁴¹ George Akerlof, *Procrastination and Obedience*, 81 Am. Econ. Rev. 1 (1991).

⁴² Ted O’Donoghue and Matthew Rabin, *Present Bias: Lessons Learned and to be Learned*, 105 Am Econ L Rev 273 (2015).

⁴³ See Matthew Edwards, *The Law, Marketing and Behavioral Economics of Consumer Rebates*, 12 Stan. J Law, Business, and Finance 362 (2007).

⁴⁴ Joshua Tasoff and Robert Letzler, *Everyone believes in redemption: Nudges and overoptimism in costly task completion*, 107 J Econ. Behav. and Org. 107 (2014).

⁴⁵ *Id.* at 108.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 113.

⁵⁰ *Id.*

⁵¹ *Id.* at 114.

⁵² *Id.* at 115.

actually did. When hearing about the behavior of other groups, people apparently thought, “Well, those are *other* groups. What do they have to do with us?” In other contexts, reminders often work, because they focus people’s attention and reduce the power of inertia. But in this case, reminders turned out to be useless.⁵³ The only effective intervention was simplification, which had a strong impact on what people actually did.⁵⁴ By making it easier to mail in the form and thus reducing sludge, simplification significantly increased people’s willingness to act. The redemption rate rose to about 54 percent – which means that the disparity between belief and behavior was cut in half.⁵⁵

The relevant study is of course relatively narrow, but it has large implications. Suppose, for example, that under federal regulations, small businesses must fill out certain forms in order to be eligible for important benefits or to avoid significant penalties. They might intend to do exactly that, but if the task is difficult, their behavior might not match their intentions. The costs might turn out to be very high. To get slightly ahead of the story: It would make sense for federal regulators to “scrub” existing paperwork burdens to make sure that they are not doing unintended or inadvertent harm.

The right to vote may be the most fundamental of all, and federal law requires states send to mail-in forms (“return cards”) before purging voters on change-of-residence grounds (given a voter has not already confirmed a move).⁵⁶ Each state is allowed to choose its own trigger for sending the return card. Some states use change-of-address information provided by the United States Postal Service,⁵⁷ but others use methods that can very foreseeably flag voters who have in fact not moved and thus remain eligible.⁵⁸ A qualified voter can be struck for failing to mail the

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 52 U.S.C. § 20507 (d). This provision is part of the National Voter Registration Act which, among other purposes, is aimed to “ensure that accurate and current voter registration rolls are maintained.” 52 U.S.C. § 20501(b)(4).

⁵⁷ This is the practice suggested by federal law. 52 U.S.C. § 20507 (c)(1). Thirty-six states do at least this. Nat. Assn. of Secretaries of State (NASS) Report: Maintenance of State Voter Registration Lists 5–6 (Dec. 2017), available at <https://www.nass.org/sites/default/files/reports/nass-report-voter-reg-maintenance-final-dec17.pdf>.

⁵⁸ See, e.g., Iowa Code § 48A.28.3 (2012) (permitting the sending of notice each year); Ga. Code Ann. § 21–2–234 (Supp. 2017) (inactive voters targeted by sending notice to registrants with whom there has been “no contact” for three years); Pa. Stat. Ann., Tit. 25, § 1901(b)(3) (Purdon 2007) (notice sent to voters who have not voted in five years); Wis. Stat. Ann. § 6.50(1) (2017 West Cum. Supp.) (notice sent to voters who have not voted in four years). Ohio Rev. Code Ann. § 3503.21(B)(2) (notice sent to those who fail to vote in two consecutive federal elections). Note also that some states trigger notices based on dubious interstate databases. See, e.g., Okla. Admin. Code § 230:15–11–19(a)(3) (2016) (notice sent to those who have not voted since the “second previous General Election” and those who fail references to interstate databases); see also Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote* (2018), https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.pdf (the system used by Oklahoma, Crosscheck, is unreliable and inaccurate).

form back and not voting for four years.⁵⁹ Voters—and Congress,⁶⁰ and the Supreme Court⁶¹—might be optimistic that they will do that – but their optimism might be misplaced.

More generally, sludge has a significant impact that people do not foresee. People are unrealistically optimistic about the likelihood that they will overcome inertia. Even specialists might be surprised at the extent to which apparently promising strategies fail. In addition, sludge can be used opportunistically by clever marketers who seek to give consumers the impression that they will receive an excellent deal, but who know that consumers will not take advantage of the opportunity. In most cases, government officials do not seek to act opportunistically. (I will qualify this claim in several places.) At the same time, sludge might have a damaging effect that they do not anticipate.

D. Cognition and Scarcity

With respect to redemption, the power of simplification puts a spotlight on the consequences of seemingly modest administrative burdens – on the effects of “choice architecture” in determining outcomes.⁶² In many domains, participation rates can be dramatically increased with a mere shift from requiring people to apply (“opt-in”) to automatically enrolling them (“opt-out”).⁶³ In an especially dramatic study, Peter Bergman of Columbia University and Todd Rogers of Harvard University find that if parents are asked whether they want to sign up to receive text-message alerts about the academic progress of their children, participation rates are tiny -- around one percent.⁶⁴ If the sign-up process is simplified, participation rates increase significantly, to about eight percent.⁶⁵ But if parents are automatically signed up, participation rates jump to 96 percent. Most changes in choice architecture do not have effects of that magnitude.⁶⁶ But simplification and burden reduction do not merely reduce frustration; they can change people’s lives.

An underlying reason is that our cognitive resources are limited.⁶⁷ Inevitably, we are able to focus on only a small subset of life’s challenges. For those who are busy, poor, disabled, or elderly, the problem of cognitive scarcity is especially serious.⁶⁸ For that reason, it is important

⁵⁹ 52 U.S.C. § 20507 (d)(1)(ii)

⁶⁰ 52 U.S.C. § 20507 (d) makes failure to send the return card back one of the two sufficient conditions for removing a registered voter from the rolls on change-of-address grounds.

⁶¹ *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1845, 201 L. Ed. 2d 141 (2018) (rejecting the argument that voters throw away return cards so often as to make them “worthless”).

⁶² See Richard H. Thaler and Cass R. Sunstein, *Nudge* (2008).

⁶³ See Eric Johnson and Daniel Goldstein, *Do Defaults Save Lives?*, 302 *Science* 1338 (2003).

⁶⁴ Peter Bergman and Todd Rogers, *The Impact of Defaults on Technology Adoption*, 5 (2018), https://scholar.harvard.edu/files/todd_rogers/files/bergman_and_rogers_the_impact_of_defaults.pdf

⁶⁵ *Id.*

⁶⁶ See Brigitte C. Madrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 *Q J Econ* 1149, 1184 (2001). For a discussion of the effect of inertia on choice of travel modes, see Alessandro Innocenti, Patrizia Lattarulo, and Maria Grazia Paziienza, *Heuristics and Biases in Travel Mode Choice* *20 (LabSi Working Paper No 27/2009, Dec 2009), online at <http://www.labsi.org/wp/labsi27.pdf> (visited Apr 3, 2011).

⁶⁷ See Xavier Gabaix, *Behavioral Inattention* (2017), available at <https://www.nber.org/papers/w24096>

⁶⁸ See Sendhil Mullainathan and Eldar Shafir, *Scarcity: Why Having Too Little Means So Much* (2013).

to focus on the *distributional effects of administrative burdens* – on whom they are most likely to hurt.⁶⁹

As a practical matter, the answer is often the poorest among us. A central reason is that if you are poor, you have to focus on a wide range of immediately pressing problems.⁷⁰ If the government is asking people to navigate a complex system or to fill out a lot of forms, they might give up. When programs are designed to benefit the elderly, sludge might be especially damaging. The problem of sex equality deserves particular attention.⁷¹ Because women do a disproportionate amount of administrative work – running the household, arranging meals, taking care of children – a significant reduction could address a pervasive source of inequality.

III. Justifying Sludge

Notwithstanding these points, paperwork burdens often serve important goals. Sometimes they are indispensable. We can readily imagine four possible justifications for sludge: (1) program integrity; (2) self-control problems; (3) privacy; and (4) targeting.

A. Program Integrity

When agencies impose paperwork burdens, it is often because of a desire to ensure that programs work as the law requires. What is true for the private sector is true for the public sector as well. Those who seek a loan, private or public, face sludge; the central reason is to ensure that they actually qualify. People should not receive Medicare, Medicaid, the Earned Income Tax Credit, or Social Security unless they are entitled to the relevant benefits. Sludge is often a way of collecting necessary information. Even in the context of voting rights, burdens of various sorts can be and often are justified as a means of ensuring that would-be voters actually qualify. The usual phrase points to “fraud, waste, and abuse”⁷²; sludge can be an effort to reduce all three.

It is true that with the increasing availability of information, and with machine learning, private and public institutions might be able to find the relevant information on their own. In the private sector, some companies use the idea of “pre-qualification,” which means that they have enough information to know, in advance, that some people are already qualified for goods or services.⁷³ Sometimes forms can be “prepopulated”; as a result, forms might not be necessary.

⁶⁹ See Herd and Moynihan, *supra* note. For helpful related discussion, see Jessica Roberts, *Nudge-Proof: Distributive Justice and the Ethics of Nudging*, 116 *Mich L Rev.* 1045 (2018). The idea has support in the PRA, which requires “particular emphasis on those individuals and entities most adversely affected.” 44 U.S.C. § 3504(c)(3).

⁷⁰ For a series of demonstrations, see Herd and Moynihan, *supra* note.

⁷¹ Elizabeth Emens, *Admin*, 103 *Geo L.J.* 1409 (2015); Elizabeth Emens, *Life Admin: How I Learned to Do Less, Do Better, and Live More* (forthcoming 2019).

⁷² Jerry L. Mashaw & Theodore R. Marmor, *Conceptualizing, Estimating, and Reforming Fraud, Waste, and Abuse in Healthcare Spending*, 11 *Yale J. on Reg.* 455 (1994); Julie K. Taitsman, *Educating Physicians to Prevent Fraud, Waste, and Abuse*, 364 *The New England Journal of Medicine* 102 (2011); 6 U.S.C. § 795 (“The Administrator shall ensure that all programs within the Agency administering Federal disaster relief assistance develop and maintain proper internal management controls to prevent and detect fraud, waste, and abuse.”)

⁷³ For a prescient discussion, see Ekambaram Paleenswaran and Mohan Kumaraswamy, *Recent Advances and Proposed Improvements in Contractor Prequalification Methodologies*, 36 *Building and Environment* 73 (2001).

One example is the idea of return-free filing, which eliminate the need for taxpayers to fill out forms at all.⁷⁴ In the fullness of time, we should see significant movements in this direction.

But those movements remain incipient. For the present and the near future, the most obvious justifications for sludge go by the name of “program integrity.”⁷⁵ Suppose that the Internal Revenue Service decided to send the Earned Income Tax Credit to apparently eligible taxpayers. If it could do so at low cost, and if the apparently eligible taxpayers are in fact eligible, there would be little ground for objection. The problem, of course, is the word “apparently.” It is possible that some of the recipients will not in fact be eligible. Whenever people are automatically enrolled in a program, some of them may not meet the legal criteria.

When this is so, regulators must choose between (a) a design ensuring that some eligible people will not receive a benefit and (b) a design ensuring that some ineligible people will receive a benefit. If the idea of program integrity is meant to refer to the number of errors, the choice between (a) and (b) might turn purely on arithmetic: Which group is larger? If automatic enrollment means that 500,000 eligible people receive the benefit who otherwise would not, and if sludge means that 499,999 ineligible people receive the benefit who otherwise would not, automatic enrollment is justified.

But it would be possible to see things differently. Suppose that automatic enrollment gives benefits to 200,000 eligible people but also to 200,001 ineligible people. We might think that if the 201,000 people are nearly eligible – if they are relatively poor – it is not so terrible if they receive some economic help. Alternatively, we might think that taxpayer money is accompanied by clear restrictions, and if it is given out in violation of those restrictions, a grave wrong has been committed – which means that even a modest breach of program integrity, for the advantage of those who are not eligible, is unacceptable. The most extreme version of this view would be that a grant of benefits to a very large number of eligibles would not compensate for the grant of benefits to a very small number of ineligibles. From a welfarist standpoint, the most extreme version is hard or perhaps impossible to defend: A grant of benefits to 100 people who are almost (but not) eligible would seem to be a price worth paying in return to a grant to benefits to a million people who are in fact eligible. But the correct tradeoff is not self-evident, and reasonable people might differ.

We can generalize this example. For the direct certification program, the level of accuracy appears to be very high; few ineligible children are allowed to qualify.⁷⁶ When sludge

⁷⁴ <https://www.brookings.edu/research/the-simple-return-reducing-americas-tax-burden-through-return-free-filing/>

⁷⁵ See, e.g., Centers for Medicare & Medicaid Services, Program Integrity, available at <https://www.medicaid.gov/medicaid/program-integrity/index.html>; Social Security Administration, Reducing Improper Payments, available at <https://www.ssa.gov/improperpayments/>; Leslie Book, David Williams, Krista Holub, Insights from Behavioral Economics Can Improve Administration of the EITC, 37 Va. Tax Rev. 177, 180 (2018) (noting that “[p]rogram integrity” of EITC was an important topic among employees of the IRS because 43 to 50 percent of all EITC returns are incorrect, with most errors benefitting claimants); Protecting Americans from Tax Hikes (PATH) Act, No. 114-113 (Dec. 18, 2015) (title II is deemed “program integrity” and is specifically intended to reduce fraudulent and improper payments in EITC and other programs)

⁷⁶ See supra note at xii, noting that states are required by federal law to “establish a system of direct certification of school-age SNAP participants.” To identify eligible students, most states compare SNAP files to enrolled student

is eliminated through automaticity, objections are weakened when benefits are not conferred on the ineligible. To the extent that they are, tradeoffs are inevitable, and different people can make different judgments. Consider the question of voter registration. Sludge has been defended as a way of combatting the risk of fraud and thus ensuring the integrity of the voting process.⁷⁷ On imaginable assumptions, sludge reduction could ensure that eligible people are allowed to vote while also ensuring that the same is true of (some) ineligible voters. The size of the two categories surely matters.

B. Self-Control Problems

Administrative burdens of diverse kinds might be designed to promote better decisions – to counteract self-control problems and impulsivity. Sludge can be a way of protecting people against those who might feel burdened by it. Sludge can easily be judged as a cure for a behavioral problem. Behavioral scientists sometimes contrast System 1 with System 2, where System 1 is rapid, intuitive, and often emotional, and System 2 is deliberative and reflective.⁷⁸ Sludge is a way to strengthen the hand of System 2.

For mundane decisions, small administrative burdens are frequently imposed online, with questions asking whether you are “sure you want to” send an email without a subject line, activate a ticket, cancel a recent order, or delete a file. Those burdens can be a blessing. A degree of sludge, imposed by private and public institutions, might make sense for life-altering decisions, such as marriage and divorce.⁷⁹ It might also make sense before the purchase of guns.⁸⁰ The abortion right is highly controversial, of course. Some people think that the relevant burdens are a legitimate way of protecting women from making decisions that they will regret, or of protecting the interest in fetal life. Other people think that the burdens are simply an effort to discourage exercise of a constitutional right. But even if we bracket the deepest issues, it is hardly impossible, in light of the stakes of the decision, to defend some administrative burdens efforts to promote reflection and to provide valuable information.

C. Privacy and Security

Administrative burdens are often imposed in order to obtain information about people’s backgrounds – their employment history, their income, their criminal history (of any), their credit rating, their family history, their places of residence. It is at least reasonable to think that if private and public institutions are to receive some or all of that information, it must be with

files and match them with varying criteria. Massachusetts uses first and last name along with date of birth as primary matching criteria, but the other states surveyed use multiple criteria that make an improper match unlikely. *Id.* at 31.

⁷⁷ See e.g. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 201 L. Ed. 2d 141 (2018) (holding that an Ohio statute for identifying and removing voters who had lost residency qualifications did not violate the National Voting Rights Act).

⁷⁸ See Daniel Kahneman, *Thinking, Fast and Slow* (2011).

⁷⁹ See e.g. M.G.L.A. 208 § 21 (divorce only becomes absolute 90 days after the initial judgment in Massachusetts); Fla. Stat. § 741.04 (effective date of marriage license is 3 days after application unless both partners take a four-hour premarital education course).

⁸⁰ See, e.g., Cal. Penal Code §§ 26815(a), 26950-27140, 27540(a), 27600-27750 (requiring a waiting period of 10 days for all firearm purchases).

people's explicit consent. If so, the question is whether to ask people to face administrative burdens or instead to intrude on their privacy. Perhaps it is not so terrible if the government chooses the former.

At one period, of course, officials had no real option. They could not intrude on privacy, because they lacked the means to do so. Increasingly, however, private and public institutions actually have independent access to that information, or they might be able to obtain it with a little effort. As a result, they are in a position to reduce sludge. Consider, as a simple example, the Direct Certification Program of the U.S. Department of Agriculture.⁸¹ Officials know who is poor, and so they can directly certify them. In countless other cases, available data can enable private or public institutions to announce, very simply, that certain people are eligible, and on what terms. They might be able to prepopulate forms. They might be able to share data.⁸² To that extent, sludge can be a thing of the past.

Would that be desirable? Not necessarily. Automatic enrollment might well depend on a great deal of information-gathering by institutions that people distrust. In some cases, there is a trade-off between irritating burdens on the one hand and potential invasions of privacy on the other. Consider, for example, the question how much information credit card companies should acquire before offering cards to customers. We might welcome situations in which such companies can learn what is required and simply send people offers or even cards. Whether we should do so depends in part of what information they have, and whether it might be misused. If government has or acquires the relevant information, the risks might be thought unacceptable.

The question of security is closely related. To set up an online account, people might be asked to provide, and might be willing to provide, sensitive information – involving, for example, their bank account or their credit card. Sludge might be designed to ensure against security violations. People might have to answer questions about their address, their social security number, or their mother's maiden name. These questions are not exactly fun, but they might be justified as a means of ensuring against some kind of breach. Ideally, of course, we would have some clarity about the benefits and costs of obtaining the relevant information. But if costs and benefits are difficult to specify, it might make sense to have a rough-and-ready sense that a degree of not-especially-onerous sludge is desirable to prevent the worst-case scenarios.⁸³

D. Targeting

A growing literature on “hassles” and “ordeals” explores how administrative burdens might operate as a rationing device, ensuring that certain goods go to those who most want or need them.⁸⁴ The simple idea is that burdens can improve self-selection. When a movie or a

⁸¹ See note supra.

⁸² On some of the relevant tradeoffs, see

<https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2011/m11-02.pdf>

⁸³ Work on the precautionary principle is relevant here. See Stephen Gardiner, *A Core Precautionary Principle*, 14 *J Polit Phil* 33 (2006).

⁸⁴ See Albert Nichols and Richard Zeckhauser, *Targeting Transfers through Restrictions on Recipients*, 72 *Am Econ Review* 372 (1982); Vivi Alatas et al., *Ordeal Mechanisms In Targeting: Theory And Evidence From A Field Experiment In Indonesia*, available at <https://www.nber.org/papers/w19127> (2013); Saria Gupta, *Perils of the*

concert is immensely popular, people might have to stay on the telephone or wait in line for a ridiculously long time. If that can be justified, it is because an investment of time, like an expenditure of money, helps measure how intensely people want things. In the same vein, seemingly onerous administrative burdens might be a reasonable way of screening applicants for job training or other programs. If people are really willing to run the gauntlet, we might have good reason to think that they will benefit from those programs.

The basic idea here is that it is important to find good ways to screen those who seek access to scarce resources. In markets, the willingness to pay criterion provides the standard screen; it is meant to ensure that people will receive goods if and only if they are willing to pay for them. Willingness to pay money is one way to measure need or desire; willingness to pay in terms of time and an effort (WTPT, for short) is another. It is possible to say that the willingness to pay criterion discriminates against people without much money, because willingness to pay is dependent on ability to pay. WTPT does not have that defect. If anything, it discriminates against people without much time. Some people who do not have much money do have a great deal of time. Government might use WTPT as a way of targeting – as a way of ensuring that goods are allocated to people who really need and want them. (Note also that if people are willing to pay others to do a relevant task, such as tax preparation, the difference between WTP and WTPT might be erased.⁸⁵)

The problem is that much of the time, sludge is a singularly crude method of targeting. A complex, barely manageable form for receiving federal aid is not exactly a reliable way to ensure that people who need financial help actually get that help. If the goal is to ensure that people who are eligible for EITC actually receive it, a degree of sludge is not the best sorting mechanism. Ordeals have their purposes, and sludge can be an ordeal. But it is a hazardous mechanism for targeting. Actually it is worse than that. In some cases, *ordeals work in concert with the limitations faced by poor people, so as specifically to select out those with the highest need*.⁸⁶ It is reasonable to speculate that the particular problem is pervasive. It highlights a central point here: Paperwork burdens should be assessed for their distributive effects.⁸⁷ If they have especially adverse consequences for the most disadvantaged members of society, there is a serious problem.

IV. Enlisting the PRA

Return to the number with which I began: 9.78 billion. Insofar as we are speaking of federal paperwork purposes, that number deserves serious attention. It is also important to see

Paperwork: The Impact of Information and Application Assistance on Welfare Program Take-Up In India (2017); Amedo Fossati, Rosella Levaggi, Public Expenditure Determination in a Mixed Market for Health Care, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=539382 [others]

⁸⁵ Note that the IRS provides free online tax preparation to 60% of taxpayers. See, IRS' Intent to Enter Into an Agreement With Free File Alliance, LLC (i.e., Free File Alliance), 67 C.F.R. § 67247 (2002), available at <https://www.gpo.gov/fdsys/pkg/FR-2002-11-04/pdf/02-27909.pdf>. The program is available for free to taxpayers with income less than \$66,000. Internal Revenue Service, About the Free File Program, available at <https://www.irs.gov/e-file-providers/about-the-free-file-program>.

⁸⁶ See Gupta, *supra* note.

⁸⁷ See Herd and Moynihan, *supra* note.

that there are also significant disparities across agencies, and these give a fuller picture than the aggregate number⁸⁸:

Table 1
FY 2015 Paperwork Burden Hours by Agency (in millions of hours)

| Agency | Burden Hours |
|--|--------------|
| Department of the Treasury | 7,357.22 |
| Health and Human Services (HHS) | 695.88 |
| Securities and Exchange Commission (SEC) | 224.89 |
| Department of Transportation (DOT) | 214.21 |
| Department of Homeland Security (DHS) | 203.39 |
| Environmental Protection Agency (EPA) | 156.89 |
| Department of Labor (DOL) | 144.71 |
| Federal Trade Commission (FTC) | 135.37 |
| Department of Agriculture (USDA) | 127.55 |
| Department of Education | 90.84 |

These numbers provide at least a little help in identifying where the problem of sludge is most serious, and where the greatest opportunities for sludge reduction can be found. For example, the Department of Treasury, and the Internal Revenue Service in particular, win Olympic Gold for sludge production. The Department of Education is lowest on the list, but 90 million hours of annual paperwork burdens impose serious costs on universities, high schools, and students. From the raw numbers, of course, we cannot know what is necessary. Perhaps the Department of Agriculture can and should reduce sludge by 20 percent; perhaps the Department of Health and Human Services can and should reduce sludge by 10 percent. What can be done to know, or to help?

A. OIRA

The Office of Information and Regulatory Affairs (OIRA), entrusted with overseeing the PRA, has significant room to maneuver. In any particular period, it could do a lot or a little to reduce sludge. It can be relatively lenient with respect to information collection requests, or not. Its leadership can give a signal of leniency, or not. Because it assesses such requests on an individual basis, it can work on an ad hoc basis to reduce the volume of paperwork burdens added each year, or not.⁸⁹ Alternatively, OIRA can work on a more systematic basis. With its “data call,” announced every six months, it can direct agencies to undertake sludge reduction efforts.⁹⁰ It can issue guidance documents, binding on agencies; these can include ambitious

⁸⁸ See Information Collection Budget of the United States, *supra* note.

⁸⁹ OIRA provides a public account of information collection requests under review. The account deserves far more attention, academic and otherwise, than it has received to date. See https://www.reginfo.gov/public/jsp/PRA/prDashboard.myjsp?agency_cd=0000&agency_nm=All&reviewType=RV&from_page=index.jsp&sub_index=1

⁹⁰ See, e.g., <https://www.whitehouse.gov/wp-content/uploads/2018/08/Minimizing-Paperwork-and-Reporting-Burdens-Data-Call-for-the-2018-ICB.pdf>; <https://www.dol.gov/sites/default/files/oira-reducing-rep-paperwork-burdens-2012.pdf>

targets for burden reduction.⁹¹ It can work with other White House offices, and the president personally, to produce presidential memoranda or executive orders.⁹²

The choice among the various options matters in various ways. A presidential directive is of course the strongest possible statement; a data call is the weakest. A guidance document is in the middle. There are also important questions in terms of the *content* of any directions. A data call could take the form of an open-ended standard: “take paperwork burdens seriously”; “reduce them to the extent feasible.” It could specify concrete numbers: eliminate ten million burden-hours per year; cut the existing burden by ten percent.⁹³ A data call could specify ways to reduce burdens: (1) use short-form options; (2) allow electronic communication; (3) promote prepopulation; (4) make less frequent information collections; (5) reuse information that the government already has.⁹⁴ These are examples of standard formulations. They can be enforced with different degrees of energy, and it is also worthwhile to consider novel formulations, which could be more aggressive.

It would be worthwhile for OIRA to undertake an unprecedentedly bold effort to reduce paperwork burdens, with an emphasis on both the flow of new burdens and the existing stock. For purposes of illustration: With a presidential directive or a directive from OIRA itself, it could announce an initiative that would require, in the next six months:

- Identification of at least three steps to cut existing burdens through the methods of burden reduction enumerated above.
- A reduction of existing burdens by least 100,000 hours, by all agencies that impose significant burdens (by some standardized definition), and a reduction of at least 3 million hours, by the agencies that currently impose the greatest burdens.⁹⁵
- A focus on reducing burdens imposed on vulnerable subpopulations, including the elderly, the disabled, and the poor.
- A focus on reducing burdens in cases in which those burdens compromise specified policy priorities, of special interest to the current administration. (These could of course differ across administrations and within administrations over time.)

An initiative of this kind could be specified in many different ways. Interactions between OIRA and relevant agencies could undoubtedly produce fresh ideas. With respect to policy priorities, different administrations would make different choices. Some administrations might

⁹¹ https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/PRAPrimer_04072010.pdf

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⁹³ For a mixture of approaches, see supra note <https://www.dol.gov/sites/default/files/oira-reducing-rep-paperwork-burdens-2012.pdf>

⁹⁴ OIRA Memorandum on Minimizing Paperwork and Reporting Burdens; Data Call for the 2018 Information Collection Budget (FY 2017 Data) (Aug. 6, 2018), available at <https://www.whitehouse.gov/wp-content/uploads/2018/08/Minimizing-Paperwork-and-Reporting-Burdens-Data-Call-for-the-2018-ICB.pdf>; see also OIRA Memorandum on Behavioral Science Insights and Federal Forms (Sept. 15, 2015), available at <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/memos/2015/behavioral-science-insights-and-federal-forms.pdf>

⁹⁵ see supra note <https://www.dol.gov/sites/default/files/oira-reducing-rep-paperwork-burdens-2012.pdf>

want to reduce information collection burdens under the Affordable Care Act; others might emphasize sludge imposed on small businesses and startups; others might emphasize burdens imposed on educational institutions; others might do all of these. Importantly, many administrative burdens are imposed by state and local governments. While OIRA has no direct authority over them, it might use its convening power to remove sludge, especially where federal, state, and local governments must coordinate.⁹⁶

B. Courts

There is a lurking question in the background: If the federal government imposes a paperwork burden in violation of the PRA, is there a legal remedy? Suppose, for example, that the Department of Health and Human Services requires hospitals to fill out a host of confusing or difficult forms. Suppose too that the burden is plainly inconsistent with the PRA, in the sense that it has not been minimized and has little practical utility. Can hospitals invoke the PRA and require invalidation of the requirement?

The answer appears to be negative. The general rule is that so long as OIRA has approved an information collection request, people have to comply with it.⁹⁷ As the Court of Claims put it, the PRA creates only “the right of a private citizen not to expend time, effort or financial resources to respond to an information collection request *that has not been approved by OMB.*”⁹⁸ This holding, followed by many courts,⁹⁹ is supported by the relevant provision of the PRA, which says¹⁰⁰:

- (a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if—
- (1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or
 - (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.
- (b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

The clear language suggests that the PRA requires only that an information collection must have and display a control number, which shows that it has been approved by OIRA. There

⁹⁶ See Dep’t of the Treasury Office of Econ. Pol’y, Council of Ec. Advisers, Dep’t of Labor, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (July 2015), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf

⁹⁷ See, e.g., *Pacific Nat. Cellular v. United States*, 41 Fed. Cl. 20 (Fed. Cl. 1998).

⁹⁸ *Id.* (emphasis added).

⁹⁹ *Id.*; *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999); *Utility Air Regulatory Grp. v. EPA*, 744 F.3d 741, 750 n.6 (D.C. Cir. 2014); *Smith v. United States*, 2008 WL 5069783 at *1 (5th Cir. 2008); *Springer v. IRS ex rel. U.S.*, 2007 WL 1252475 at *4 (10th Cir. 2007); see also *Alegent Health-Immanuel Med. Ctr. v. Sebelius*, 34 F.Supp.3d 160, 170 (D.D.C. 2014).

¹⁰⁰ 44 USC § 3512(b).

is a good argument that the PRA should be amended to allow private persons to object more broadly, perhaps on the ground that OIRA approval was arbitrary or capricious given the text of the PRA, at least in cases in which the information collection is mandatory and in which it exceeds a certain threshold. The Administrative Procedure Act generally allows judicial review of arbitrary or capricious decisions by public officials.¹⁰¹ The standard should be applied to information collections as well, given their serious cost and intrusiveness.

C. Congress

Should the PRA be amended in other ways? OIRA is historically skeptical of the idea, on the ground that even if one or another amendment would be a good idea, putting the statute in play, in Congress, would be open the door for other amendments, which may be uninformed or counterproductive. Nonetheless, some helpful suggestions are worth considering.¹⁰²

First, Congress should explicitly require agencies to choose the least burdensome method for achieving their goals. This is essentially a requirement of cost-effectiveness: if annual reporting would be as effective as quarterly reporting, then agencies should choose annual reporting. As we have seen, the current requirements can be understood to require cost-effectiveness, but an explicit legislative signal would be considerable good. Second, Congress should require explicitly require the benefits of paperwork requirements to justify the costs. As we have seen, cost-benefit balancing can also be seen as required by the PRA in its current form. But the statute is hardly clear on that point, and again, Congress should give an explicit signal to this effect.

With respect to paperwork, as with respect to regulation in general, it is important to appreciate the difference between cost-effectiveness and cost-benefit analysis. The former requires the choice of the least costly way of achieving a specified goal. For that reason, cost-effectiveness is a modest idea, and it should not be contentious. Who would support a relatively costly way of achieving a goal¹⁰³? A burden might be cost-effective but nonetheless fail cost-benefit analysis. In general, it is important to say that even if a burden is cost-effective, it should be assessed in cost-benefit terms, to ensure that it is worthwhile on balance.¹⁰⁴

It is true and important that cost-benefit balancing is not always simple for paperwork burdens. When agencies engage in such balancing, the general goal is to compare the social benefits and the social costs.¹⁰⁵ A paperwork burden may or may not generate social benefits.

¹⁰¹ 42 USC 706.

¹⁰² See Stuart Shapiro, *The Paperwork Reduction Act: Benefits, Costs and Directions for Reform*, 30 *Government Information Quarterly* 204 (2013).

¹⁰³ It is true, however, that paperwork burdens can be seen as a kind of tax, and for some purposes, a tax should be increased. Consider paperwork burdens imposed on tobacco companies, as part of a regime of regulation. It is not obviously unreasonable to think that while cost-minimization is generally a good idea, it is not necessarily a good idea if it reduces the equivalent of a tax imposed on harm-creating activity. Perhaps OIRA should not work especially hard to minimize paperwork burdens imposed on cigarette companies. This point is not meant to offer a final conclusion, but simply to flag the issue.

¹⁰⁴ See Cass R. Sunstein, *The Cost-Benefit Revolution* (2018), for an attempt to justify this proposition, but with many qualifications.

¹⁰⁵ See <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>

When the IRS imposes paperwork burdens on taxpayers, it might be trying to ensure that they do what the law requires. We can speak of economic costs (in terms, perhaps, of monetized hours¹⁰⁶) and of economic benefits (in terms, perhaps, of dollars gained by the Treasury).¹⁰⁷ But that is not standard cost-benefit analysis. Or a paperwork might be designed (for example) to ensure that people applying for benefits actually deserve those benefits, as, for example, when the effort is to avoid giving transfers to people who are entitled to them.

In such cases, a crude approach would be to understand the cost-benefit justification not as an effort to compare social costs and social benefits, but instead as an entailing assessment of *proportionality*: Are significant costs likely to serve significant purposes? What is the magnitude of the costs,¹⁰⁸ and what is the magnitude of the gains? Real numbers would help inform decisions and combat excessive burdens. It is worth emphasizing the fact that even a crude form of cost-benefit analysis would be *information-forcing*. It would create a stronger incentive for agencies to offer accurate accounts of the number of burden hours,¹⁰⁹ and also to turn them into monetary equivalents. It would simultaneously create an incentive for agencies to be more specific, and more quantitative, about the expected benefits of information collections.

We need far more information about the benefits of collecting information; a requirement of cost-benefit balancing should help. It should also help to spur improved and perhaps creative ways to test whether the benefits of information collections justify the costs.¹¹⁰

D. Sludge Audits

An advantage of the Information Collection Budget of the United States is that it can be seen as a kind of national “Sludge Audit.” Covering the entire federal government, it collects agency-by-agency burdens and also aggregates them. It is also highly visible.

For the moment, let us put its limitations to one side. Many institutions should be conducting Sludge Audits. State and local governments should certainly be doing that. The same is true of a wide assortment of nations in Europe, Asia, Africa, and the Americas. Transparency about sludge would be first step toward reducing it. One of the advantage of Sludge Audits is that they should impose a kind of reality check, increasing the likelihood that burden estimates will not be unduly optimistic.

My focus here has been on public institutions, but a great deal of sludge comes from private institutions, for better or for worse.¹¹¹ Such institutions should be conducting Sludge Audits of their own. Banks, insurance companies, hospitals, and publishers could save a great

¹⁰⁶ See Adam M. Samaha, Death and Paperwork Reduction, 65 *Duke Law Journal* 279-344 (2015).

¹⁰⁷ For relevant discussion, see David Weisbach et al., The Marginal Revenue Rule in Cost-Benefit Analysis, 160 *Tax Notes* 1507 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254325

¹⁰⁸ On the importance of testing, see

<https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/memos/testing-and-simplifying-federal-forms.pdf>

¹⁰⁹ *Id.*

¹¹⁰ Weisbach et al., *supra* note, seems to me an important advance, and in some ways it is quite generalizable.

¹¹¹ On worse, see Akerlof and Shiller, *supra* note.

deal of money by reducing sludge – and they could improve the experience of people who interact with them. It is worth underlying the case of hospitals, where sludge can not only create immense frustration, but also impair health and possibly cost lives.

V. Conclusion

The idea of deregulation is usually applied to removal of formal regulations – environmental regulations, food safety regulations, regulations of motor vehicles. But administrative burdens are regulatory in their own way, and they impose a kind of tax. If they require nearly 10 billion hours of paperwork annually, they are imposing, at a minimum, about \$200 billion in monetary equivalents. Because administrative burdens can frustrate enjoyment of rights and prevent access to important benefits of multiple sorts, that figure greatly understates the actual impact.

In these circumstances, there is a strong argument for a deregulatory effort aimed particularly at paperwork burdens.¹¹² Such an effort would call for reductions of burdens at the level of program design, including radical simplification of existing requirements and (even better) use of default options to cut learning and compliance costs. Automatic enrollment can drive administrative burdens down to zero. Where automatic enrollment is not possible, officials might use an assortment of tools: frequent reminders; simplification and plain language; online, telephone, or in-person help; and welcoming messages to reduce psychological costs.¹¹³ What is necessary is a heavily empirical approach to administrative burdens, including an effort to weigh their benefits against their costs and a careful assessment of their distributional effects.¹¹⁴ Are they really helping to reduce fraud? By how much? What are the take-up rates, and how do they vary across populations, including the most vulnerable? What are the compliance costs, in terms of time and money?

To be sure, the answers to these questions will not always be self-evident. If sludge discourages exercise of the abortion right, people will disagree about whether that is a benefit or a cost. But in many cases, acquisition of the relevant information will demonstrate that sludge is not worth the candle. For the future, it should be a principal priority for deregulation, because its benefits cannot possibly justify its costs.

¹¹² See Emens, *supra* note, for a sharp and highly engaging discussion of multiple aspects of the problem.

¹¹³ See Herd and Moynihan, *supra* note.

¹¹⁴ See *id.*