

Essay

SLUDGE AND ORDEALS

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ABSTRACT

Is there an argument for behaviorally informed deregulation? 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,” understood as friction, 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. 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. Fifth, it can help public officials to acquire valuable information, which they can use for important purposes. In most cases, however, these defenses of sludge turn out to be far more attractive in principle than in practice. For sludge, a form of cost-benefit analysis is essential, and it will often demonstrate the need for a neglected form of deregulation: sludge reduction. For both public and private institutions, “Sludge Audits” should become routine, and they should provide a foundation for behaviorally informed deregulation. Various suggestions are offered for new action by the Office of Information and Regulatory Affairs,

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which oversees the Paperwork Reduction Act; for courts; and for Congress.

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I. 9.78 BILLION HOURS

Enacted in 1979, the Paperwork Reduction Act (“PRA”)¹ was meant to be 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 provision states:

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

- (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

1. Paperwork Reduction Act of 1995, Pub. L. 104-13, 109 Stat. 163 (codified as amended at 44 U.S.C. §§ 3501–3521 (2012)).

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.²

For present purposes, the most important provisions are (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*. 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 collection of information. If an agency is imposing highly burdensome information collection without good reason, courts appear to be unavailable, notwithstanding the general rule in favor of review for arbitrariness.

All this creates serious problems. The idea of “deregulation” is usually taken to refer to elimination or reduction of the kinds of burdens imposed through notice-and-comment rulemaking, as with repeal of rules on the books.⁴ Elimination or reduction of paperwork

2. 44 U.S.C. § 3504(c) (emphasis added).

3. For discussion of some of the complexities with this concept, see *COST-EFFECTIVENESS IN HEALTH AND MEDICINE* (Marthe R. Gold, Louise B. Russell, Joanna E. Siegel & Milton C. Weinstein eds., 1996).

4. See PAUL L. JOSKOW & RICHARD SCHMALENSSEE, *MARKETS FOR POWER: AN ANALYSIS OF ELECTRICAL UTILITY DEREGULATION* 211 (1988); Cass R. Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 SUP. CT. REV. 177, 203–04 (noting that “deregulation involves an inquiry into a well-defined, actual [agency] decision,” with an emphasis on repeal of regulations).

is not generally understood as deregulation.⁵ 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 revolution, in which the benefits of regulations are generally required to justify their costs.⁶ 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. Crucially, it should ask distributional questions as well. Who is helped by paperwork burdens? Who is hurt? The disabled? The poor? The elderly? By how much? As we shall see, the most plausible answers are instructive.

There is an additional point. In recent years, behavioral science has played a significant role in thinking about regulation, leading not merely to academic pleas for behaviorally informed initiatives of various kinds but also to actual initiatives in multiple domains, often producing large benefits at low cost.⁷ But if we put a spotlight on sludge, we will be interested in something different and insufficiently explored: *behaviorally informed deregulation*.⁸ To be sure, fully rational people, unaffected by behavioral biases, might be, and are, adversely affected by sludge. As we shall see, however, behavioral biases of various sorts make sludge especially harmful and sometimes devastating.

5. For an example of efforts to deregulate in this way, see Memorandum from Cass R. Sunstein, Admin., OIRA, to the Heads of Exec. Dep'ts & Agencies, and Indep. Reg. Commissions (Aug. 9, 2012), <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/memos/testing-and-simplifying-federal-forms.pdf> [<https://perma.cc/X9QY-TVUU>] [hereinafter Memorandum from Cass R. Sunstein (Aug. 9, 2012)]; Memorandum from Cass R. Sunstein, Admin., OIRA, to the Heads of Exec. Dep'ts & Agencies (June 22, 2012), <https://www.dol.gov/sites/default/files/oira-reducing-rep-paperwork-burdens-2012.pdf> [<https://perma.cc/FRA5-M5P2>] [hereinafter Memorandum from Cass R. Sunstein (June 22, 2012)] (providing direction to agencies consistent with the PRA and Executive Order 13610, *Identifying and Reducing Regulatory Burdens*).

6. For a description of this revolution, see CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* (2018) (describing the rise of cost-benefit balancing in government).

7. Examples of such initiatives can be found in DAVID HALPERN, *INSIDE THE NUDGE UNIT* (2015); PETE LUNN, *REGULATORY POLICY AND BEHAVIOURAL ECONOMICS* (2014); RHYS JONES, JESSICA PYKETT & MARK WHITEHEAD, *CHANGING BEHAVIOURS* (2011); George Loewenstein & Nick Chater, *Putting Nudges in Perspective*, 1 *BEHAVIOURAL PUB. POL'Y* 26 (2017); Mark Whitehead, Rhys Jones, Rachel Lilley, Rachel Howell & Jessica Pykett, *Neuroliberalism: Cognition, Context, and the Geographical Bounding of Rationality*, 42 *PROGRESS IN HUM. GEOGRAPHY* 325 (2018).

8. In my view, this is a large category that is not limited to sludge, but I am focused only on the latter issue here.

Even in a highly polarized time, it should be possible to obtain a working consensus for many forms of sludge reduction, which can be sought and enthusiastically approved by people with diverse political convictions. Whatever one's convictions, one might support sludge reduction for small businesses and startups, in the healthcare system, in transportation, in education, in occupational licensing, and in many other domains. To be sure, political differences might break out in some contexts—involving, for example, abortion and divorce—where differing moral judgments may lead to radically different evaluations of sludge. But in many contexts, sludge reduction ought to have broad appeal. And even when disagreements do break out, an improved understanding of the importance of sludge, and its concrete effects, can help people to understand where they differ, and exactly why.

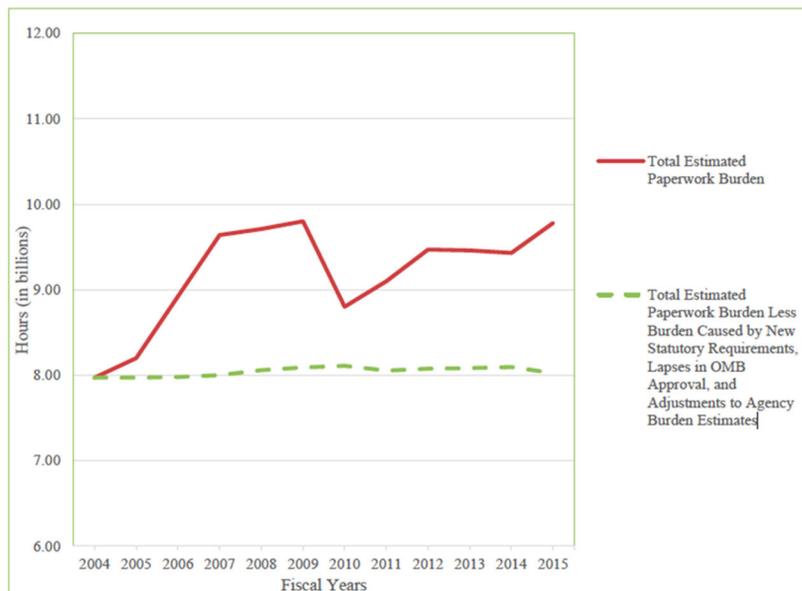
The PRA requires the Office of Management and Budget (“OMB”) to produce an annual report, called the Information Collection Budget of the United States Government (“ICB”).⁹ The ICB quantifies the annual paperwork burden that the U.S. government imposes on its citizens. The most recent official report finds that in 2015, Americans spent 9.78 billion hours on federal paperwork.¹⁰ In early 2019, an official running count had the number at 11.25 billion hours;¹¹ that number is almost certainly more accurate than the 2015 figure, but because it has not been subject to the same level of internal and external scrutiny, I will rely on the 9.78-billion-hour figure here. In spite of significant shifts,¹² the burden has been high for a long time:

9. 44 U.S.C. § 3514(a) (2012).

10. OFF. OF MGMT. & BUDGET, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT 2 (2016) https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/icb/icb_2016.pdf [<https://perma.cc/3FYG-M93W>] [hereinafter INFORMATION COLLECTION BUDGET 2016]. Puzzlingly, the Trump administration has failed to produce the annual report, though it is required by law. See *Office of Management and Budget Reports*, WHITE HOUSE.GOV, <https://www.whitehouse.gov/omb/information-regulatory-affairs/reports> [<https://perma.cc/B75H-FAL3>] (listing the 2016 Information Collection Budget as the most recent).

11. *Government-Wide Totals for Active Information Collections*, OIRA, <https://www.reginfo.gov/public/do/PRAReport?operation=11> [<https://perma.cc/H9K2-J424>].

12. The significant drop in fiscal year 2010 was principally the result of reassessments of existing burdens rather than an actual drop in burdens. But there was a significant reduction in actual burdens from new initiatives, in the vicinity of \$386 million. See OFF. OF MGMT. & BUDGET, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT iv (2011), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/icb/2011_icb.pdf [<https://perma.cc/DNM2-L85D>].

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 Chicago¹³ 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.¹⁴ The Office of Information and Regulatory Affairs (“OIRA”) has not attempted to monetize those hours, though in 2010, it asked for public comments on

13. *QuickFacts: Chicago City, Illinois, U.S.* CENSUS BUREAU, <https://www.census.gov/quickfacts/chicagocityillinois> [<https://perma.cc/R7UR-D89B>].

14. Regrettably, the ICB 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. See INFORMATION COLLECTION BUDGET 2016, *supra* note 10, at 7 tbl.1 (accounting for over 6.9 billion of the 9.4 billion paperwork-burden hours in fiscal year 2014).

whether and how to do so.¹⁵ If we value an hour of work at \$20,¹⁶ 9.78 billion hours is the equivalent of \$195.6 billion—more than double the budget of the Department of State¹⁷ and the Department of Transportation,¹⁸ about triple the budget of the Department of Education,¹⁹ and about eight times the budget of the Department of Energy.²⁰ The monetary figures greatly understate the problem. Administrative burdens can make it difficult or impossible for people to enjoy fundamental rights (such as the right to vote and the right to free speech), to obtain licenses and permits, to obtain life-changing benefits, or to avoid crushing hardship.²¹ With respect to the right to

15. See Request for Comments on Implementation of the Paperwork Reduction Act, 74 Fed. Reg. 55,269 (Oct. 27, 2009). I served as Administrator of OIRA 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. 55,788 (Oct. 14, 1999). For a valuable relevant discussion, see generally Adam M. Samaha, *Death and Paperwork Reduction*, 65 DUKE L.J. 279 (2015).

16. The \$20 figure is used to simplify the illustration. 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 HUM. SERV. & FOOD AND DRUG ADMIN., TOBACCO PRODUCT STANDARD FOR N-NITROSONORNICOTINE LEVEL IN FINISHED SMOKELESS TOBACCO PRODUCTS 78 (Jan. 2017), <https://www.fda.gov/downloads/aboutfda/reportsmanualsforms/reports/economicanalyses/ucm537872.pdf> [<https://perma.cc/46HT-25RZ>] (“Labor hours are valued at the current market wage as reported by the May 2015 Occupational Employment Statistics published by the Bureau of Labor Statistics (US Bureau of Labor Statistics, 2015).”); *Average Hourly and Weekly Earnings of All Employees on Private Nonfarm Payrolls by Industry Sector, Seasonally Adjusted*, BUREAU OF LAB. STAT., <https://www.bls.gov/news.release/empst19.htm> [<https://perma.cc/42WN-8CDG>] (listing the average hourly wage across private industries in January 2019 as \$27.56); see also Samaha, *supra* note 15, at 298 (“Not knowing who would be randomly selected for the survey, the [Institute of Museum and Library Services] used the national average per capita income of about \$20 per hour to convert respondent time into dollar cost.”).

17. DEP'T OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION 1 (2018), <https://www.state.gov/documents/organization/277155.pdf> [<https://perma.cc/9DM2-EYGR>] (requesting a budget of \$37.8 billion for the 2019 fiscal year).

18. DEP'T. OF TRANSP., BUDGET HIGHLIGHTS FISCAL YEAR 2019 2 (2018), <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304476/508dotbh2019-b.pdf> [<https://perma.cc/MDC8-8F93>] (requesting a budget of \$76.5 billion for the 2019 fiscal year).

19. DEP'T. OF EDUC., FACT SHEET: PRESIDENT TRUMP'S FY 2019 BUDGET 1 (2018), <https://www2.ed.gov/about/overview/budget/budget19/budget-factsheet.pdf> [<https://perma.cc/5A8J-X4U9>] (requesting a budget of \$63.2 billion for the 2019 fiscal year).

20. DEP'T OF ENERGY, FY 2019 BUDGET FACT SHEET 1 (2018), <https://www.energy.gov/sites/prod/files/2018/02/f48/DOE-FY2019-Budget-Fact-Sheet.pdf> [<https://perma.cc/6DZ4-QHGE>] (requesting a budget of \$30.6 billion for the 2019 fiscal year).

21. Cf. PAMELA HERD & DONALD MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 22–30 (2019) (discussing the concept of administrative burden and outlining its components); see generally Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409 (2015) (explaining how administrative tasks, like paperwork, hinder the leisure, sleep, relationships, and work of individuals, especially women); ELIZABETH F. EMENS, LIFE ADMIN:

choose abortion, such burdens can be decisive impediments.²² They can also make it difficult for people to receive the Earned Income Tax Credit, which is one of the nation's most beneficial antipoverty programs.²³ In short, paperwork burdens have massive negative effects on people's lives.

Professor Richard H. Thaler has coined a helpful term for such burdens: sludge.²⁴ The term should be taken to refer to the kind of friction, large or small, that people face when they want to go in one or another direction.²⁵ For their own reasons, whether self-interested or altruistic, private and public institutions might impose or increase sludge. In the private sector, companies can use sludge to increase profits. For example, people might want to cancel a subscription to a magazine in which they no longer have the slightest interest, but to do that, they might have to wade through a great deal of sludge.²⁶ In the public sector, sludge may be an accident, but it might also be a political choice. People might want to sign their child up for some beneficial program, such as free transportation or free school meals, but the

HOW I LEARNED TO DO LESS, DO BETTER, AND LIVE MORE (2019) (illustrating the impact of administrative burdens in life and offering advice to mitigate it).

22. See HERD & MOYNIHAN, *supra* note 21, at 71–72.

23. *Id.* at 195–96.

24. Richard H. Thaler, *Nudge, Not Sludge*, 361 SCIENCE 431 (2018).

25. I am bracketing here the precise relationship between nudge and sludge. It is most useful to see both terms as descriptive rather than normative. It should be clear that nudges can be for good or for bad; on the bad, see GEORGE AKERLOF & ROBERT SHILLER, PHISHING FOR PHOOLS (2015) (describing, among other examples, the strategies that Cinnabon founder Rich and Greg Komen developed to push people to making the “unhealthy” decision to eat a Cinnabon). It should also be clear that sludge can be for good or for bad. It is reasonable to see sludge as a kind of nudge, in the form of *increased friction*, which can nudge people in a helpful or unhelpful way. If people are nudged to choose 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.

26. 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 toward unwanted subscriptions for gym memberships, television, insurance, and online streaming services; during that time, nine out of ten consumers who tried to cancel a subscription were initially refused by the company. 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> [<https://perma.cc/U35F-GRTW>].

sludge might defeat them.²⁷ To obtain financial aid for college, students are required to fill out the Free Application for Federal Student Aid (“FAFSA”).²⁸ 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).²⁹ Many students give up.³⁰ The right to vote may be the most fundamental of all, but a sludge-filled registration process may disenfranchise many millions of people.³¹ A sludge-reduction initiative be a Voting Rights Act.

A great deal of evidence establishes that reducing administrative burdens can have a large impact on people’s lives. Millions of people are now benefiting from the Global Entry Program, which reduces time, trouble, and stress in security lines at airports.³² For free school

27. A corrective is the direct certification program, discussed below. See DEP’T OF AGRIC., DIRECT CERTIFICATION IN THE NATIONAL SCHOOL LUNCH PROGRAM: STATE IMPLEMENTATION PROGRESS, SCHOOL YEAR 2014–2015, at 2 (2015), <https://www.fns.usda.gov/direct-certification-national-school-lunch-program-report-congress-state-implementation-progress-0> [<https://perma.cc/D6PP-X4GL>].

28. See Eric Bettinger, Bridget Terry Long, Philip Oreopoulos & Lisa Sanbonmatsu, *The Role of Simplification and Information in College Decisions: Results from the H&R Block FAFSA Experiment 1* (Nat’l Bureau of Econ. Research, Working Paper No. 15361, 2009), <https://www.nber.org/papers/w15361> [<https://perma.cc/66EG-VQXD>] (“To determine eligibility, students and their families must fill out an eight-page, detailed application called the Free Application for Federal Student Aid (FAFSA), which has over 100 questions.”).

29. See Susan Dynarski & Mark Wiederspan, *Student Aid Simplification: Looking Back and Looking Ahead* 8–11 (Nat’l Bureau of Econ. Research, Working Paper No. 17834, 2012), <https://www.nber.org/papers/w17834> [<https://perma.cc/5VTH-682V>].

30. *Id.* at 5 (“Millions of students and adult learners who aspire to college are overwhelmed by the complexity of student aid. Uncertainty and confusion robs them of its significant benefits.” (quoting ADVISORY COMMITTEE ON STUDENT FIN. ASSISTANCE, *THE STUDENT AID GAUNTLET: MAKING ACCESS TO COLLEGE SIMPLE AND CERTAIN* i (2005), <https://files.eric.ed.gov/fulltext/ED496648.pdf> [<https://perma.cc/788M-DFZ8>])).

31. See, e.g., HERD & MOYNIHAN, *supra* note 21, at 47–60; LA. ADVISORY COMMITTEE FOR THE U.S. COMMISSION ON CIVIL RIGHTS, *BARRIERS TO VOTING IN LOUISIANA* 25–26 (2018), <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf> [<https://perma.cc/VCV4-BVQB>] (recommending reduction in paperwork associated with voter registration to increase access to the polls); JONATHAN BRATER, KEVIN MORRIS, MYRNA PÉREZ & CHRISTOPHER DELUZIO, BRENNAN CTR. FOR JUSTICE, *PURGES: A GROWING THREAT TO THE RIGHT TO VOTE* (2018), <http://www.brennancenter.org/publication/purges-growing-threat-right-vote> [<https://perma.cc/74YE-P6ZP>]; THE LEADERSHIP CONF. EDUC. FUND, *THE GREAT POLL CLOSURE* (2016), <http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf> [<https://perma.cc/GRS7-953K>].

32. See Press Release, U.S. Customs and Border Protection, Secretary Napolitano Announces Final Rule for Permanent Global Entry Program (Feb. 6, 2012), <https://www.cbp.gov/newsroom/national-media-release/secretary-napolitano-announces-final-rule-permanent-global-entry> [<https://perma.cc/G9WR-PUJB>]. The program now has five million members. Press Release, U.S. Customs and Border Protection, CBP Announces 5 Million Global

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.³³ If the school district has enough information to know that they are eligible, they are automatically enrolled.³⁴ In the 2014–15 school year, more than 11 million children benefited from the program (about 91 percent of the eligible population).³⁵

Simplification of FAFSA dramatically increases the likelihood that low-income people will apply for aid and eventually enroll in college.³⁶ 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.³⁷ 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.³⁸ The private sector can do a great deal more to reduce sludge—to help workers choose from among healthcare plans, to make life easier for consumers and employees with ideas or complaints, and to help people avoid serious risks.³⁹

Entry Members (Apr. 3, 2018), <https://www.cbp.gov/newsroom/national-media-release/cbp-announces-5-million-global-entry-members> [<https://perma.cc/S5VF-HV87>].

33. See NATIONAL SCHOOL LUNCH PROGRAM, *supra* note 27, at 2 (“Direct certification typically involves matching SNAP, TANF, and FDPIR records against student enrollment lists, at either the State or the LEA level.”).

34. *Id.* at 4.

35. *Id.* at 15, 24.

36. See Dynarski & Wiederspan, *supra* note 29, at 19; Bettinger et al., *supra* note 28, at 23.

37. See *Automatic Voter Registration*, BRENNAN CTR. FOR JUSTICE (Nov. 7, 2018), <https://www.brennancenter.org/analysis/automatic-voter-registration> [<https://perma.cc/6EPA-GD5T>]. 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. See *History of AVR & Implementation Dates*, BRENNAN CTR. FOR JUSTICE (Nov. 7, 2018), <https://www.brennancenter.org/analysis/history-avr-implementation-dates> [<https://perma.cc/VXY8-RKQB>].

38. ROB GRIFFIN, PAUL GRONKE, TOVA WANG & LIZ KENNEDY, CTR. FOR AM. PROG., 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> [<https://perma.cc/9L7K-YPWX>].

39. For valuable discussion, see generally Emens, *Admin*, *supra* note 21. In the healthcare context, see George Loewenstein et al., *A Behavioral Blueprint for Improving Health Care Policy*, 3 BEHAVIORAL SCI. & POL’Y 53, 53–66 (2017).

II. SLUDGE HURTS (AND CAN KILL)

Sludge can make it difficult or impossible for people to enjoy or exercise constitutional rights. For freedom of speech, licensing schemes are the most obvious example; they are a form of sludge and are usually unconstitutional for that reason.⁴⁰ The ban on prior restraints can be seen as a ban on sludge.⁴¹ In the domain of healthcare, the sludge imposed on doctors and patients can literally kill.⁴² In emergency rooms, for example, sludge has made it unnecessarily difficult for doctors to prescribe medicines that help patients overcome opioid addiction.⁴³ Efforts to reduce that sludge, through private initiative and through law, can save lives.⁴⁴

To understand why sludge matters, 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 the benefits are high, the relevant costs might prove overwhelming. These costs can take qualitatively different forms.⁴⁵ They might involve acquisition of *information*, which might be difficult and costly. They might involve *time*, which people might not have. They might be *psychological*, in the sense that they involve frustration, stigma, and humiliation. For any of those reasons, it might be very difficult to navigate or overcome the sludge. In some cases, doing the relevant paperwork might be literally impossible; it simply may not be feasible for people to fill out the forms. By themselves, these points help explain low take-up rates for many federal and state programs,⁴⁶

40. Cf. *Cox v. New Hampshire*, 312 U.S. 569, 575, 576 (1941) (upholding a licensing scheme that regulated only the “time, place and manner” of speech).

41. Cf. Thomas Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 670 (1955) (describing prior restraint as a “particular method of control which experience has taught tends to create a potent and unnecessary mechanism of government that can smother free communication”).

42. See Felice J. Freyer, *Emergency Rooms Once Offered Little for Drug Users. That’s Starting to Change*, BOS. GLOBE (Dec. 10, 2018), <https://www.bostonglobe.com/metro/2018/12/09/emergency-rooms-once-had-little-offer-addicted-people-that-starting-change/guX2LGPqG1UdAf9xUV9rXI/story.html> [https://perma.cc/FH6P-C2UF].

43. See *id.*

44. See *id.* (describing Massachusetts General Hospital’s efforts to increase emergency-room resources for patients addicted to opioids).

45. See HERD & MOYNIHAN, *supra* note 21, at 23; Donald Moynihan, Pamela Herd & Hope Harvey *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions*, 25 J. PUB. ADMIN. RES. & THEORY 43, 45–46 (2014).

46. See Janet Currie, *The Take up of Social Benefits* 11–12 (Inst. for the Study of Labor in Bonn, Discussion Paper No. 1103, 2004) (examining rates of enrollment in social benefits within

as well as the immense difficulty that people often have in obtaining permits or licenses of various sorts.⁴⁷ We can even see sludge as an obstacle to freedom, especially insofar as it reduces or impairs navigability.⁴⁸

A. “*Everyone Believes In Redemption*”

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,⁴⁹ and people tend to procrastinate.⁵⁰ If people suffer from inertia and if they procrastinate, they might never do the necessary paperwork. The problem is compounded by “present bias.”⁵¹ 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 tasks until another day. That day may never come, even if the consequences of delay are quite serious.

the United States and United Kingdom); *see generally* Katherine Baicker, William J. Congdon, & Sendhil Mullainathan, *Health Insurance Coverage and Take-Up: Lessons from Behavioral Economics*, 90 MILBANK Q. 107 (2012) (examining low health-insurance take-up rates from a behavioral-economic perspective); Carole Roan Gresenz, Sarah E. Edgington, Miriam Laugesen, & José J. Escarce, *Take-Up of Public Insurance and Crowd-Out of Private Insurance Under Recent CHIP Expansions to Higher Income Children*, 47 HEALTH SERVS. RES. 1999 (2012) (analyzing the effect of expanding CHIP eligibility on health-insurance take-up rates); Saurabh Bhargava & Dayanand Manoli, *Improving Take-Up of Tax Benefits in the United States*, ABDUL LATIF JAMEEL POVERTY ACTION LAB (2015), <https://www.povertyactionlab.org/evaluation/improving-take-tax-benefits-united-states> [<https://perma.cc/TPW8-XDHU>] (noting that “many people who are eligible for social and economic benefits do not claim those benefits” in the United States).

47. REGULATORY REFORM TEAM, *Case Study: Chicago Licensing and Permitting Reform*, DATA-SMART CITY SOLUTIONS (Mar. 19, 2015), <https://datasmart.ash.harvard.edu/news/article/case-study-chicago-licensing-and-permitting-reform-647> [<https://perma.cc/X3YJ-JSLM>] (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”).

48. On this theme, *see* CASS R. SUNSTEIN, ON FREEDOM (2019).

49. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON 1149, 1185 (2001) (identifying inertia as a force working against participation in 401(k) plans); *see also* John Pottow & Omri Ben-Shahar, *On the Stickiness of Default Rules*, 33 FLA. ST. U.L. REV. 651, 651 (2006) (“It is by now recognized that factors beyond drafting costs might also cause parties to stick with an undesirable default rule . . .”).

50. George Akerlof, *Procrastination and Obedience*, 81 AM. ECON. REV. 1, 1–17 (1991) (examining several “behavioral pathologies,” including procrastination).

51. *See* Ted O’Donoghue & Matthew Rabin, *Present Bias: Lessons Learned and to be Learned*, 105 AM. ECON. REV. 273, 273–78 (2015).

Mail-in forms impose a type of sludge.⁵² 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*.⁵³ 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.⁵⁴ Because of the power of inertia, that might not be terribly surprising. What is more striking is the finding that people are *unrealistically optimistic* about the likelihood that they will ever redeem forms.⁵⁵ In the relevant study, people thought that there was about an 80 percent chance that they would do so within the 30 days they were given.⁵⁶ The actual redemption rate was 31 percent.⁵⁷ 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.⁵⁸ Second, they issued two clear reminders, one soon after purchase and another when the deadline for redemption was near.⁵⁹ Third, they made redemption far simpler by eliminating the requirement that people must print out and sign a certification page.⁶⁰

As it turned out, not one of the three interventions reduced people's optimism. In all conditions, people thought there was about an 80 percent chance that they would mail in the forms.⁶¹ Moreover, and somewhat surprisingly, the first two interventions had no effect on

52. See Matthew Edwards, *The Law, Marketing and Behavioral Economics of Consumer Rebates*, 12 STAN. J.L. BUS. & FIN. 362, 419–21 (2007).

53. Joshua Tasoff & Robert Letzler, *Everyone Believes in Redemption: Nudges and Overoptimism in Costly Task Completion*, 107 J. ECON. BEHAV. & ORG. 107, 115 (2014).

54. *Id.* at 108.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 113.

59. *Id.*

60. *Id.* at 114.

61. *Id.* at 115.

what people 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.⁶²

The only effective intervention was simplification, which had a strong impact on what people actually did.⁶³ 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.⁶⁴

B. Behavioral Biases and Sludge

The relevant study is of course relatively narrow, but it has large implications. Recall that inertia is a powerful force and that, because of inertia, people might not fill out necessary forms.⁶⁵ That is one reason that participation rates are often much lower with opt-in designs than with opt-out designs.⁶⁶ Recall too that inertia is aggravated by present bias, leading people to focus on the short term and neglect the future.⁶⁷

Suppose in this light that under federal regulations, individuals, small businesses, and startups 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 can be put off, or if it is burdensome or difficult, their behavior might not match their intentions. The actual costs might turn out to be very high; the perceived costs might be far higher. To get slightly ahead of the story:

62. *Id.*

63. *Id.*

64. *Id.*

65. See Madrian & Shea, *supra* note 49, at 1185; see generally William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988) (finding that status quo bias influences students’ decisions about healthcare plans and retirement programs).

66. For an especially dramatic illustration, see Peter Bergman, Jessica Lasky-Fink & Todd Rogers, *Simplification and Defaults Affect Adoption and Impact of Technology, But Decision Makers Do Not Realize This* (Harvard Kennedy Sch. Faculty Research Working Paper Series, Working Paper No. RWP17-021, 2018), <https://ssrn.com/abstract=3233874> [<https://perma.cc/YWN6-BBCJ>].

67. See Keith Marzilli Ericson & David Laibson, *Intertemporal Choice* 27–32 (Nat. Bureau of Econ. Research, Working Paper No. 25358, 2018), <https://www.nber.org/papers/w25358> [<https://perma.cc/E9TG-5FAS>] (reviewing models and empirical research on present bias).

it would make sense for federal regulators to “scrub” existing paperwork burdens to make sure that they are not doing unintended or inadvertent harm. That is the idea of a “Sludge Audit.”

The right to vote may be the most fundamental of all, and federal law requires states to send mail-in forms (“return cards”) before purging voters from electoral rolls on change-of-residence grounds (if a voter has not already confirmed a move).⁶⁸ 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,⁶⁹ but others use methods that can very foreseeably flag voters who have in fact not moved and thus remain eligible.⁷⁰ A qualified voter can be struck for failing to mail the return card back and not voting for four years.⁷¹ Voters—along with Congress⁷² and the Supreme Court⁷³—may be optimistic that they will do that, but their optimism might be misplaced.

More generally, sludge has a significant impact that many people do not foresee. As the redemption study shows, 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

68. National Voter Registration Act of 1993, 52 U.S.C. § 20507(d) (2012). This provision of the National Voter Registration Act, among other purposes, is aimed to “ensure that accurate and current voter registration rolls are maintained.” 52 U.S.C. § 20501(b)(4).

69. This is the practice suggested by federal law. *See* 52 U.S.C. § 20507(c)(1). Thirty-six states do at least this. *See* NAT’L ASSN. OF SECRETARIES OF STATE, NASS REPORT: MAINTENANCE OF STATE VOTER REGISTRATION LISTS 5–6 (2017) (Dec. 2017), <https://www.nass.org/sites/default/files/reports/nass-report-voter-reg-maintenance-final-dec17.pdf> [<https://perma.cc/FXJ6-RPXK>].

70. *See, e.g.*, IOWA CODE § 48A.28.3 (2018) (permitting the sending of notice each year); GA. CODE ANN. § 21-2-234(a)(1)–(2) (2018) (notice sent to registrants with whom there has been “no contact” for three years); PA. STAT. ANN., tit. 25, § 1901(b)(3) (2018) (notice sent to voters who have not voted in five years); OHIO REV. CODE ANN. § 3503.21(B)(2) (2018) (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) (2018) (notice sent to those who have not voted since the “second previous General Election” and those who fail references to interstate databases); WIS. STAT. ANN. § 6.50(1) (2018) (notice sent to voters who have not voted in four years); *see also* JONATHAN BRATER, ET AL., *supra* note 31, at 7–8 (explaining how the system used by Oklahoma, “Crosscheck,” is unreliable and inaccurate).

71. *See* 52 U.S.C. § 20507(d)(1)(ii).

72. 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.

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

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.⁷⁴ In many cases, government officials are not seeking to act opportunistically; they are responding to political values and commitments, which is not the same thing.⁷⁵ At the same time, sludge might have a damaging effect that they do not anticipate. In particular, officials might not understand the extent to which sludge will adversely affect a population that they are seeking to help.

C. *Cognition and Scarcity*

With respect to redemption, the power of simplification puts a spotlight on the large consequences of seemingly modest administrative burdens—on the effects of “choice architecture” in determining outcomes.⁷⁶ I have noted that 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).⁷⁷ In an especially dramatic study, Professors Peter Bergman of Columbia University and Todd Rogers of Harvard University found 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 1 percent.⁷⁸ If the signup process is simplified, participation rates increase significantly, to about 8 percent.⁷⁹ But if parents are automatically signed up, participation rates jump to 96 percent.⁸⁰ To be sure, most changes in choice architecture

74. For relevant discussion, see Petra Persson, *Attention Manipulation and Information Overload*, 2 BEHAVIOURAL PUB. POL'Y 78 (2018); Thomas Blake, Sarah Moshary, Kane Sweeney & Steven Tadelis, *Price Salience and Product Choice* (NAT'L BUREAU OF ECON. RESEARCH, Working Paper No. 25186, 2018), <https://www.nber.org/papers/w25186?sy=186> [<https://perma.cc/Y54U-9K9S>].

75. See Moynihan et al., *supra* note 45, at 65 (outlining how burdens may be imposed to serve legitimate political values).

76. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 83–105 (2008) (describing choice architecture).

77. See Eric Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338, 1338–39 (2003) (explaining that organ donation increases when it is opt-out rather than opt-in).

78. Peter Bergman & Todd Rogers, *The Impact of Defaults on Technology Adoption* 5 (Harvard Kennedy Sch. Faculty Research Working Paper Series, Working Paper No. RWP17-021, 2018), https://scholar.harvard.edu/files/todd_rogers/files/bergman_and_rogers_the_impact_of_defaults.pdf [<https://perma.cc/N7GF-BCY9>].

79. *Id.*

80. *Id.*

do not have effects of that magnitude.⁸¹ 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.⁸² 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.⁸³ For that reason, it is important to focus on the *distributional* effects of administrative burdens—on whom they are most likely to hurt.⁸⁴

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.⁸⁵ If the government is asking poor people to navigate a complex system or to fill out a lot of forms, they might give up. But the problem is hardly limited to the poor. When programs are designed to benefit the elderly, sludge might be especially damaging, at least if the population suffers from reduced cognitive capacity. For different reasons, the problem of sex equality deserves particular attention.⁸⁶ Because women do a disproportionate amount of administrative work—running the household, arranging meals, taking care of children—a significant reduction in sludge could address a pervasive source of social inequality, with ramifying effects on other areas of life.

81. See, e.g., Madrian & Shea, *supra* note 49, at 1184 (summarizing behavioral changes resulting from 401(k) participation and savings behavior as a result of changing default options). For a discussion of the effect of inertia on choice of travel modes, see Alessandro Innocenti, Patrizia Lattarulo & Maria Grazia Pazienza, *Heuristics and Biases in Travel Mode Choice* 20 (LabSi, Working Paper No. 27/2009, 2009), <http://www.labsi.org/wp/labsi27.pdf> [<https://perma.cc/P23F-42UL>].

82. See Xavier Gabaix, *Behavioral Inattention* (Nat'l Bureau of Econ. Research, Working Paper No. 24096, 2018), <https://www.nber.org/papers/w24096> [<https://perma.cc/FQ2L-M3VN>].

83. See SENDHIL MULLAINATHAN & ELДАР SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 147–66 (2013).

84. See HERD & MOYNIHAN, *supra* note 21. 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) (2012).

85. For a series of demonstrations, see HERD & MOYNIHAN, *supra* note 21, at 30–31.

86. See text accompanying *supra* note 21 (explaining that a disproportionate amount of everyday administrative burdens fall on women).

III. A VERY QUICK TOUR OF THE HORIZON

It would be valuable to catalogue an assortment of programs that have been adversely affected, to varying degrees, by sludge.⁸⁷ A book could easily be written on that topic. Instead of venturing that, I will borrow heavily from a superb treatment by Professors Pamela Herd and Donald Moynihan, who offer a series of case studies. Herd and Moynihan demonstrate that in some programs, burdens are a serious problem, but in others, the government has ensured that they are negligible. With respect to sludge, a model program is Social Security, which is simple and in many ways automatic. As Herd and Moynihan put it, “the biggest bookkeeping organization in the world banished burdens.”⁸⁸ The U.S. government bears the relevant administrative burdens, and it generally requires citizens to do very little. The Social Security Administration (“SSA”) tracks people’s earnings and determines eligibility and benefit levels automatically. If you are eligible, you can enroll online or go to one of the nation’s 1200 field offices.⁸⁹ After you do that, you are likely to receive direct deposits into your bank account within a month.⁹⁰

As a matter of history, there is a large irony here. In the 1930s, the supposed administrative challenge was taken as a serious objection to the very idea of Social Security.⁹¹ But the federal government succeeded in meeting that challenge. It did so in part through the creation and use of Social Security numbers, which make it much simpler to track people’s earnings over their entire working lives.⁹² The SSA has worked hard and mostly successfully to cut sludge and thus to make things easy for beneficiaries, replacing lost Social Security cards, taking applications, updating records, and ensuring the accuracy of payments.⁹³ For beneficiaries, the program is working. The poverty rate among older adults is now just 9 percent; if Social Security were not included in their income, it would be 40 percent.⁹⁴ Almost one-third

87. For a valuable discussion of sludge in the context of medical education, see generally Joel Yager & Jeffrey E. Katzman, *Bureaucrathologies: Galloping Regulositis, Assessment Degradosis, and Other Unintended Organizational Maladies in Post-Graduate Medical Education*, 39 ACAD. PSYCHIATRY 678 (2015).

88. *Id.* at 215.

89. *Id.* at 233.

90. *Id.* at 215.

91. *Id.* at 219; 225–26.

92. *Id.* at 227.

93. *Id.* at 233.

94. *Id.* at 237.

of beneficiaries rely on the program for at least 90 percent of their income.⁹⁵

The level of sludge is also relatively low for the Earned Income Tax Credit (“EITC”), a wage subsidy for low-income workers.⁹⁶ Most programs designed to benefit poor people have dispiriting take-up rates of between 30 and 60 percent; for the EITC, the rate is about 80 percent.⁹⁷ That is excellent news, for the EITC ranks among the most effective of U.S. antipoverty programs. Because it makes work more remunerative, it significantly increases labor-force participation.⁹⁸ The EITC also makes a major dent in the national poverty rate and helps children in particular, with beneficial effects on their health, their cognitive abilities, and their long-term educational prospects.⁹⁹

For the EITC, the relatively high take-up rate is a product of relatively low levels of sludge. The paperwork requirements are modest; a standard tax return is all that is necessary. The Internal Revenue Service (“IRS”) sends simple, clear reminders to people who appear to be eligible, and the reminders significantly increase participation rates.¹⁰⁰ It also runs voluntary programs that provide free tax help. Because participation involves little in the way of frustration or stigma, the psychological costs are low. True, the EITC is not as simple or automatic as Social Security, and sludge reduction thus remains a priority. If 20 percent of eligible people are not receiving the benefit, there is a serious problem. The IRS almost certainly knows enough to enroll people automatically and send a refund to eligible taxpayers.¹⁰¹ Nonetheless, the administrative burdens for recipients are much lower than they might be, partly because of an unlikely coalition between business interests and those seeking to help the working poor.¹⁰²

95. *Id.*

96. For a general discussion, see MAKING WORK PAY (Bruce Meyer & Douglas Holtz-Eakin eds. 2002).

97. HERD & MOYNIHAN, *supra* note 21, at 191.

98. *Id.* at 196.

99. *Id.* at 194.

100. *Id.* at 196.

101. Surprisingly, there appears to be no literature on automatic enrollment and the EITC. This area deserves sustained study.

102. *Id.* at 213.

Herd and Moynihan contrast benefits programs that impose far more daunting burdens. For the Affordable Care Act,¹⁰³ federalism has turned out to be a major challenge. Opposed to the very idea of Obamacare, twenty-seven states simply refused to adopt exchanges, which were supposed to provide people with a simple, relatively sludge-free way to buy health insurance.¹⁰⁴ Citizens in those states have had to apply through federal exchanges, and that is far more cumbersome. Successful applicants initially receive a notice from the federal government that they are eligible for the state Medicaid program. The federal government then transfers the file to the state. After that, the state determines eligibility.¹⁰⁵ This process can take months, and it has left millions of people in limbo. The Obama administration reduced burdens by publicizing the program and by simplifying coordination. But the Trump administration reduced funding for publicity and shortened the signup period.¹⁰⁶

Medicare is a nearly universal program aimed at older people.¹⁰⁷ Those who are eligible for Social Security are usually eligible for Medicare too. The sludge comes from the astonishingly complex process faced by Medicare enrollees when choosing among services. What is the right supplemental insurance plan? What is the right prescription drug plan? Is a Medicare Advantage Plan a good idea? These are difficult questions, and as Herd and Moynihan emphasize, older adults often suffer from cognitive decline.¹⁰⁸ They quote a Medicare beneficiary who notes, “That’s what gets me, they wait until we retire to make it complicated.”¹⁰⁹ A great deal of behavioral evidence finds that Medicare beneficiaries are making poor choices and losing money in the process.¹¹⁰ For that reason, there is a good

103. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C. § 18001 (2012)).

104. HERD & MOYNIHAN, *supra* note 21, at 98.

105. *Id.* at 99.

106. *Id.* at 118.

107. Social Security Amendments of 1965, Pub. L. 89-97, 79 Stat. 286 (codified as amended in scattered sections at 25, 26, 29 & 42 U.S.C. (2012)). Medicare is understood in four parts. Hospital insurance in Part A, 42 U.S.C. § 1395c; supplemental medical insurance in Part B, 42 U.S.C. § 1395j; managed care in Part C, 42 U.S.C. § 1395w-21; and drug benefits in Part D, 42 U.S.C. § 1395w-101.

108. HERD & MOYNIHAN, *supra* note 21, at 134–35.

109. *Id.* at 134.

110. See Saurabh Bhargava, George Loewenstein & Justin Sydnor, *Choose to Lose: Health Plan Choices From a Menu With Dominated Options*, 132 Q. J. ECON. 1319, 1322 (2017) (noting that in both experimental and field studies, individuals did not select the most financially efficient Medicare plans).

argument that the government should simplify the process with the use of online tools, telephone assistance (with shorter waiting times), and customized recommendations.¹¹¹

Under current law, states are allowed to regulate the abortion right so long as their regulations do not impose an “undue burden.”¹¹² Because that standard has a degree of elasticity, it invites states to take steps to discourage abortion. They have enthusiastically taken up the invitation.¹¹³ For example, states have required pregnant women to engage in mandatory counselling, which includes descriptions not only of the procedure but also of fetal pain. They have required women to take and see an ultrasound, to make multiple visits to clinics, and to undergo significant waiting periods.¹¹⁴ These requirements impose evident costs in terms of learning, compliance, and psychology.

To capture those costs, Herd and Moynihan offer an extensive quotation from a thirty-five-year-old woman, describing her experience of navigating administrative burdens in Wisconsin. Here is an excerpt:

I am shaken. I am embarrassed. I am tired of waiting. I am now called into a room. I can bring Hubby this time. We are told to watch a video, again required by state law. The video talks about adoption, foster parenthood, the dangers of abortion, my rights. It drags on. I feel like a small child. Husband looks concerned and helpless. I sign a form indicating my understanding of the information presented on the video. We wait. A nurse finally comes back in. Time to go back to the waiting room. We'll call you in a short while.¹¹⁵

These administrative burdens have had an impact. According to one study, they increase the cost of abortion by 19 percent and decrease the number of abortions by between 13 and 15 percent.¹¹⁶ One consequence appears to be an increase in the incidence of self-administered abortions.¹¹⁷

111. HERD & MOYNIHAN, *supra* note 21, at 138.

112. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

113. See HERD & MOYNIHAN, *supra* note 21, at 90–92; Kate L. Fetrow, Note, *Taking Abortion Rights Seriously: Toward a Holistic Undue Burden Jurisprudence*, 70 STAN. L. REV. 319, 322 (2018) (noting that the “undue burden” standard allows states to chip away at the right to an abortion).

114. *Id.* at 71.

115. HERD & MOYNIHAN, *supra* note 21, at 78–79.

116. *Id.* at 82.

117. *Id.*

The Fifteenth Amendment to the U.S. Constitution, forbidding denial of the vote “on account of race, color, or previous condition of servitude,” was ratified in 1870,¹¹⁸ but administrative burdens have long been used to disenfranchise African Americans. For decades, literacy tests were a favorite instrument; they were eventually forbidden by the Voting Rights Act of 1965.¹¹⁹ In recent years, administrative burdens have become less onerous, in the sense that voting is more convenient, and registration is generally easier.¹²⁰ But such burdens continue to exist, and in some states, they are mounting. They are plainly being used as a political weapon, most prominently by Republican leaders seeking to impose sludge so as to increase their electoral prospects.¹²¹

Some states are purging from the voter rolls people who have not voted for a specified number of years or responded to a notice, thus requiring them to register again.¹²² Other states are purging voters on the basis of flawed technologies designed to prevent noncitizens or felons from voting.¹²³ Some states require state-issued photo identification.¹²⁴ That might not seem so onerous, but according to some estimates, about 11 percent of Americans do not have a state-issued photo identification (including about 25 percent of African Americans).¹²⁵ States have also increased residency requirements and required proof of citizenship.¹²⁶ With respect to the right to vote, administrative burdens of multiple kinds are working to disenfranchise African Americans, the elderly, and low-income individuals.¹²⁷

118. U.S. CONST. amend. XV.

119. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified at 52 U.S.C. §§ 10101, 10301–10314, 10501–10508, 10701–10702 (2012)). Literacy tests are prohibited under 52 U.S.C. § 10101(a)(2)(C).

120. HERD & MOYNIHAN, *supra* note 21, at 47.

121. *Id.* at 63–64 (noting the correlation between Republican states and voter ID laws and explaining the correlation with party policies).

122. *See* text accompanying *supra*, note 71; *see also* HERD & MOYNIHAN, *supra* note 21, at 53.

123. *See* BRATER ET AL., *supra* note 31, at 5–10.

124. *See Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/QF6Z-VAKK>] (noting that 34 states have laws requesting or requiring voters to show some form of identification to vote, and seven of those require state-issued photo identification).

125. Denise Lieberman, *Barriers to the Ballot Box: New Restrictions Underscore the Need for Voting Laws Enforcement*, 39 HUM. RTS. 2, 3 (2012).

126. *See* HERD & MOYNIHAN, *supra* note 21, at 52.

127. *Id.* at 2.

IV. JUSTIFYING SLUDGE

Notwithstanding these points, paperwork burdens often serve important goals. Sometimes they are indispensable. As the examples suggest, we can readily imagine five possible justifications for sludge: (1) program integrity, (2) self-control problems, (3) privacy, (4) targeting, and (5) data collection.

A. *Program Integrity*

When agencies impose paperwork burdens, it is often because of a desire to ensure that programs work in the way that the law requires. One reason involves eligibility restrictions; another involves record-keeping. 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 EITC, or Social Security unless they are entitled to the relevant benefits, and 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 meet existing legal requirements. For spending programs, a usual justification for paperwork burdens points to “fraud, waste, and abuse”;¹²⁸ 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 “prequalification,” which means that they have enough information to know, in advance, that some people are already qualified for goods or services.¹²⁹ Sometimes forms can be

128. See 6 U.S.C. § 795 (2012) (“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.”); 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 NEW ENG. J. MED. 102, 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.”).

129. For a prescient discussion, see generally Ekambaram Paleenswaran & Mohan Kumaraswamy, *Recent Advances and Proposed Improvements in Contractor Prequalification Methodologies*, 36 BUILDING & ENV'T 73 (2001).

“prepopulated”; as a result, forms might not be necessary.¹³⁰ In the domain of taxation, one example is the idea of return-free filing, which eliminates the need for taxpayers to fill out forms at all.¹³¹ In the fullness of time, we should see significant movements in this direction.¹³²

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.”¹³³ Suppose that the IRS decided to send the EITC 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 (1) a design ensuring that some eligible people will not receive a benefit and (2) 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

130. Note the emphasis on prepopulation in Memorandum from Neomi Rao, Admin., OIRA, to Chief Information Officers 8 (Aug. 6, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/08/Minimizing-Paperwork-and-Reporting-Burdens-Data-Call-for-the-2018-ICB.pdf> [<https://perma.cc/KF9L-N6NZ>] [hereinafter Memorandum from Neomi Rao (Aug. 6, 2018)] (“Sometimes agencies collect data that are unchanged from prior applications; in such circumstances, they may be able to use, or to give people the option to use, pre-populated electronic forms.”).

131. See AUSTAN GOOLSBEE, BROOKINGS INST., THE ‘SIMPLE RETURN’: REDUCING AMERICA’S TAX BURDEN THROUGH RETURN-FREE FILING 2 (2006), <https://www.brookings.edu/wp-content/uploads/2016/06/200607goolsbee.pdf> [<https://perma.cc/C695-5YQL>] (“For the millions of taxpayers who could use the Simple Return, however, filing a tax return would entail nothing more than checking the numbers, signing the return, and then either sending a check or getting a refund.”).

132. See Memorandum from Neomi Rao (Aug. 6, 2018) *supra* note 130, at 8 (“Also worth considering is whether, in some circumstances, to dispense with forms entirely and to rely on more automatic, generic, or direct approval of participation.”)

133. See Protecting Americans from Tax Hikes (PATH) Act, Pub. L. No. 114-113, 129 Stat. 2242 (2015) (referring to Title II as “Program Integrity” and specifically intending to reduce fraudulent and improper payments in the EITC and other programs); 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 the 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); CTRS. FOR MEDICARE & MEDICAID SERVS., *Program Integrity*, <https://www.medicaid.gov/medicaid/program-integrity/index.html> [<https://perma.cc/2ZMC-XTSH>] (Medicaid Program Integrity); *Reducing Improper Payments*, SOC. SEC. ADMIN., <https://www.ssa.gov/improperpayments> [<https://perma.cc/T8ZN-XA32>] (Social Security programs).

choice between (1) and (2) 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 a degree of 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. Some people might think that if the 200,001 people are nearly eligible—if they are relatively poor—it is not so terrible if they receive some economic help. But other people might insist that taxpayer money is accompanied by clear restrictions and argue that if it is given out in violation of those restrictions, a grave wrong has been committed. On this view, 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 outweigh 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 a hundred people who are almost (but not) eligible would seem to be a price worth paying in exchange for a grant of 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. In the direct-certification program for school lunches, the level of accuracy appears to be very high; few ineligible children are allowed to qualify.¹³⁴ When sludge 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.¹³⁵ On imaginable

134. See NATIONAL SCHOOL LUNCH PROGRAM, *supra* note 27, at xiii (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 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 28–33.

135. See, e.g., *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1848 (“The NVRA plainly reflects Congress’s judgment that the failure to send back the card, coupled with the failure to

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, recklessness, and impulsivity. Sludge can be a way of protecting people against their own errors. For that reason, 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.¹³⁶ 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 an excellent idea.

A degree of sludge, imposed by private and public institutions, might make sense for life-altering decisions, such as marriage and divorce.¹³⁷ “Cooling-off periods” can be a blessing.¹³⁸ If System 1 is leading people to make rash decisions, a mandatory waiting time might be useful as a way of allowing System 2 to have its say.¹³⁹ Some sludge

vote during the period covering the next two general federal elections, is significant evidence that the addressee has moved.”).

136. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 13–15 (2011).

137. See, e.g., FLA. STAT. ANN. § 741.04 (2018) (making the effective date of marriage licenses three days after application unless both partners take a premarital education course); MASS. ANN. LAWS ch. 208, § 21 (2018) (allowing divorce to become absolute 90 days after the initial judgment).

138. See Pamaría Rekaiti & Roger Van den Bergh, *Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach*, 23 J. CONSUMER POL’Y 371, 397 (2000) (“Cooling-off periods are potential remedies for the problems of irrational behaviour, situational monopoly, and informational asymmetry.”); Dainn Wie & Hyoungjong Kim, *Between Calm and Passion: The Cooling-Off Period and Divorce Decisions in Korea*, 21 FEMINIST ECON. 187, 209 (2015) (“The cooling-off period has no significant impact on divorce rates when the cause of divorce is . . . dishonesty, abuse, or discord with other family members. . . . [C]ouples reporting the cause of divorce as personality difference or financial distress responded to the cooling-off periods.”).

139. See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1187–88 (2003); see generally Wie & Kim, *supra* note 138 (finding that the mandatory cooling-off period for divorce reduced the final divorce rate in Korea).

might also make sense before the purchase of guns, partly as a way of promoting deliberation.¹⁴⁰

The abortion right is highly controversial, of course, but for that very reason, it is an especially interesting example. For example, some people think that counseling requirements and mandatory 24-hour waiting periods are legitimate ways of protecting women from making decisions that they will regret, or of protecting fetal life. Other people think that the burdens are simply an effort to discourage the exercise of a constitutional right.¹⁴¹ 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 as 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 (if any), their credit rating, their family history, their places of residence. Those who seek to work in government, certainly at levels that involve national security, are required to provide a great deal of information of that sort.¹⁴² 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 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. Return, as a simple example, to the Direct Certification program of the U.S. Department of Agriculture.¹⁴³ Officials know who is poor, and so

140. See, e.g., CAL. PENAL CODE § 26815(a) (2018) (requiring a waiting period of ten days for all firearm purchases).

141. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 918–21 (1992) (Stevens, J., concurring in part and dissenting in part) (discussing these potential justifications but concluding that the 24-hour waiting period is unconstitutional).

142. For an example, see U.S. OFFICE OF PERS. MGMT., STANDARD FORM 86: QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS (2010), https://www.opm.gov/forms/pdf_fill/sf86-non508.pdf [<https://perma.cc/KB9P-JJ8D>].

143. See *supra* note 27 and accompanying text.

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.¹⁴⁴ To that extent, sludge can be a thing of the past.

But 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 of 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.¹⁴⁵

D. Targeting and WTPT

A growing literature on “hassles” and “ordeals” explores how administrative burdens might operate as a rationing device, ensuring

144. On some of the relevant tradeoffs, see generally Memorandum from Jeffrey D. Zients, Dep. Dir. for Mgmt., & Cass R. Sunstein, Admin., OIRA, to Heads of Executive Departments and Agencies (Nov. 3, 2010), <https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2011/m11-02.pdf> [<https://perma.cc/56QK-7HCR>] (encouraging federal agencies to share data to improve program implementation while complying with privacy laws).

145. Cf. Stephen M. Gardiner, *A Core Precautionary Principle*, 14 J. POL. PHIL. 33 (2006) (discussing the precautionary principle).

that certain goods go to those who most want or need them.¹⁴⁶ The simple idea is that burdens can improve self-selection. When a movie or a 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 effort (“WTPT,” for short) is another. It is possible to argue 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.

There may or may not be a correlation between lacking money and lacking time. Government might choose to 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.¹⁴⁷

146. Examples include: Albert Nichols & Richard Zeckhauser, *Targeting Transfers through Restrictions on Recipients*, 72 AM. ECON. REV. 372 (1982); Vivi Alatas et al., *Ordeal Mechanisms in Targeting: Theory and Evidence from a Field Experiment in Indonesia* (Nat’l Bureau of Econ. Research, Working Paper No. 19121, 2013), <https://www.nber.org/papers/w19127.pdf> [<https://perma.cc/6XFF-QP8E>]; Amedeo Fossati & Rosella Levaggi, *Public Expenditure Determination in a Mixed Market for Health Care* (May 4, 2004) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=539382 [<https://perma.cc/GF5A-YRY5>]; Sarika Gupta, *Perils of the Paperwork: The Impact of Information and Application Assistance on Welfare Program Take-Up in India* (Nov. 15, 2017) (unpublished Ph.D. job market paper, Harvard University Kennedy School of Government), https://scholar.harvard.edu/files/sarikagupta/files/gupta_jmp_11_1.pdf [<https://perma.cc/K4HY-3YK4>].

147. Note that the IRS provides free online tax preparation to 60 percent of taxpayers. IRS’ Intent to Enter into an Agreement with Free File Alliance, LLC (i.e., Free File Alliance), 67 Fed. Reg. 67,247 (Nov. 4, 2002). The program is available for free to taxpayers with income less than

The problem is that sludge is often a singularly crude method of targeting. A complex, barely comprehensible 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 the 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—and 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*.¹⁴⁸ It is reasonable to speculate that this particular problem is pervasive. It highlights a central point here. Paperwork burdens should be assessed for their distributive effects.¹⁴⁹ If they have especially adverse consequences for the most disadvantaged members of society, there is a serious problem.

E. Acquiring Useful Data

Public officials might impose administrative burdens in order to acquire data that can be used for multiple purposes, and that might benefit the public a great deal. For example, officials might want to know whether people who receive employment training, or some kind of educational funding, are actually benefiting from the relevant program. What do they do with that training or that funding? Administrative burdens might be essential to obtain answers to that question. Or suppose that the government is trying to reduce the spread of an infectious disease, to promote highway development, to monitor hazardous-waste management, to ensure that pilots are properly certified and that airplanes are properly maintained, or to see how food-safety programs are working.¹⁵⁰ Those who receive information-collection requests might complain of sludge. But the relevant burdens might be justified as a means of ensuring acquisition of important or even indispensable knowledge.

\$66,000 annually. Internal Revenue Service, *About the Free File Program* (Nov. 21, 2018), <https://www.irs.gov/e-file-providers/about-the-free-file-program> [<https://perma.cc/L5CL-X4ZG>].

148. See Gupta, *supra* note 146, 30–31.

149. See HERD & MOYNIHAN, *supra* note 21, at 6–8.

150. Some of these examples are drawn from OIRA's Information Collection Dashboard. *Information Collection Review Dashboard*, OIRA, https://www.reginfo.gov/public/jsp/PRA/prDashboard.myjsp?agency_cd=0000&agency_nm=All&reviewType=EX&from_page=index.jsp&sub_index=1 [<https://perma.cc/8X7M-9RHE>]. For those who are interested in sludge reduction, or in information collection in general, the Dashboard (typically neglected by scholars) is worth careful attention.

In some of these cases, of course, such burdens might be an effort to ensure program integrity. But I am emphasizing a different point. Even if program integrity is already guaranteed, officials might seek information, and require people to provide it, in order to provide both short-term and long-term benefits. Importantly, that information might be made public and used by private and public sectors alike.¹⁵¹ In the modern era, acquisition of information might promote public and private accountability. It might save money. It might spur innovation. It might even save lives.

These are important justifications for sludge, and they are easy to overlook. But they should not be taken as a kind of blank check or as an open invitation for officials to impose significant administrative burdens. For any particular burden, a central question is whether government is *actually acquiring useful information*. If public officials are asking people to file with paper rather than electronically, refusing to reuse information that they already have, declining to prepopulate forms, or requiring quarterly rather than annual reporting, they should face a significant burden of justification. In all of these cases, they are likely to run into difficulty in meeting that burden.

In the abstract, it is not possible to say whether sludge can be justified as a means of generating useful or important information. Some cases will be easy; any such justification will not be credible. Other cases will also be easy; any such justification is self-evidently convincing. Still other cases will be hard; without investigating the details with care, we cannot know whether such a justification is sufficient. The only point is that the benefits of sludge might be found there.

V. SLUDGE REDUCTION AS BEHAVIORALLY INFORMED DEREGULATION

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 that there are significant disparities across agencies, and these give a fuller picture than the aggregate number:¹⁵²

151. See DATA.GOV, where the U.S. government provides a great deal of useful information, much of it emerging from information-collection requests.

152. See INFORMATION COLLECTION BUDGET 2016, *supra* note 10, at 7.

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

Agency	Burden Hours
Department of the Treasury/Internal Revenue Service (IRS)	7357.22
Department of 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 the Treasury, and the IRS in particular, wins 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 how much of this burden 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?

One of the distinctive features of that question is that it can appeal to people who disagree on many political issues. Divisions with respect to climate change, tax rates for the wealthy, and immigration are generally irrelevant to the question whether to reduce sludge. To be sure, we have seen that on some issues, sludge is introduced for political reasons, and sometimes these are contentious. But a great deal can be done to reduce sludge without getting close to political divisions.

A. *The Office of Information and Regulatory Affairs*

The Office of Information and Regulatory Affairs, 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 in an ad hoc manner to reduce the volume of paperwork burdens added each year, or not.¹⁵³ Alternatively, OIRA can work more systematically. With its “data call,” announced every six months, it can direct agencies to undertake sludge reduction efforts.¹⁵⁴ It can issue binding guidance documents, which can include ambitious targets for burden reduction.¹⁵⁵ It can work with other White House offices, and the president personally, to produce presidential memoranda or executive orders.

In fact, OIRA has done all of these things. When I was Administrator of OIRA in 2012, for example, the Office directed agencies to do a great deal to reduce paperwork burdens.¹⁵⁶ For example, it called for “significant quantified reductions” in burdens, with relatively aggressive requirements:

Agencies that now impose high paperwork burdens [defined to include the Department of Treasury, the Department of Health and Human Services, the Securities and Exchange Commission, the Department of Transportation, the Environmental Protection Agency, the Department of Homeland Security, the Department of Labor, and the Department of Agriculture] should attempt to identify at least one initiative, or combination of initiatives, that would eliminate two million hours or more in annual burden. All agencies should attempt to identify at least one initiative, or combination of

153. 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* Information Collection Review Dashboard, OIRA, https://www.reginfo.gov/public/jsp/PRA/prDashboard.myjsp?agency_cd=0000&agency_nm=All&reviewType=RV&from_page=index.jsp&sub_index=1 [https://perma.cc/PD5L-9BNJ].

154. *See, e.g.*, Memorandum from Neomi Rao (Aug. 6, 2018), *supra* note 130 (including a request that agencies reduce paperwork burdens in a data call); Memorandum from Cass R. Sunstein (June 22, 2012), *supra* note 5 (same).

155. Memorandum from Cass R. Sunstein, Admin., OIRA, to the Heads of Exec. Dep’ts & Agencies & Indep. Reg. Agencies (Apr. 7, 2010), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/PRAPrimer_04072010.pdf [https://perma.cc/D3VW-ZD8T].

156. *See* Memorandum from Cass R. Sunstein (June 22, 2012), *supra* note 5.

initiatives, that would eliminate at least 50,000 hours in annual burden.¹⁵⁷

For the executive branch, the choice among the various procedural vehicles matters in various ways. A presidential directive is of course the strongest possible statement; if a document comes from the president of the United States, agencies know that it must be taken seriously. In contrast, a data call is the weakest,¹⁵⁸ and 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” or “reduce them to the extent feasible.” As in the document quoted above, it could specify concrete numbers: “eliminate ten million burden-hours per year” or “cut the existing burden by ten percent.”¹⁵⁹ A data call could specify, and has in the past specified,¹⁶⁰ ways to reduce burdens, such as: (1) use of short-form options, (2) allowing electronic communication, (3) promoting prepopulation, (4) making less frequent information collections, or (5) reusing information that the government already has.¹⁶¹ These are examples of standard formulations, and they can be enforced with different degrees of energy. It is also worthwhile to consider novel formulations, which could be far more aggressive.

157. *Id.*

158. To illustrate the point, I will violate my ordinary rule against disclosing conversations with the president of the United States. In a meeting during President Barack Obama’s first term, we discussed various options for directing agencies to follow certain principles and requirements, some of them deregulatory. The president decided in favor of a new executive order, which became Executive Order 13563. I had floated various supplements and alternatives, including a data call that I would issue. At the end of the meeting, I asked the president what, if anything, to do with the data call. The president responded, with some combination of pity, mischief, and incredulity, “Cass, the American people don’t really care that much about your darned data call.” He might have used some expression other than “darned,” but this is a family law journal.

159. For a mixture of approaches, see Memorandum from Cass R. Sunstein (June 22, 2012), *supra* note 5.

160. See, e.g., Memorandum from Neomi Rao (Aug. 6, 2018), *supra* note 130 (suggesting means for eliminating paperwork-burden hours); Memorandum from Cass R. Sunstein (June 22, 2012), *supra* note 5 (same); Memorandum from Neomi Rao, Admin., OIRA, to Chief Info. Offs. (July 21, 2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/MEMORANDUM-FOR-CHIEF-INFORMATION-OFFICERS.pdf> [<https://perma.cc/6PD4-25N7>] (same).

161. Memorandum from Neomi Rao (Aug. 6, 2018), *supra* note 130; see also Memorandum from Howard Shelanski, Admin., OIRA, and John P. Holdren, Dir., Off. of Sci. & Tech. Pol’y, to the Heads of Exec. Dep’ts & Agencies and of the Indep. Reg. Agencies (Sept. 15, 2015) <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/memos/2015/behavioral-science-insights-and-federal-forms.pdf> [<https://perma.cc/M8MX-9K6C>] (recommending the use of behavioral sciences when crafting initiatives to reduce paperwork-burden hours).

If we keep the 9.78-billion-hour figure in mind, we might be able to agree that OIRA should 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 (preferably) or a directive from OIRA itself (also good), 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.¹⁶²
- 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 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 the transportation sector or 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.¹⁶³

162. See Memorandum from Cass R. Sunstein (June 22, 2012), *supra* note 5 (recommending a reduction of two million burden hours for those agencies imposing the highest burden and a reduction of fifty thousand burden hours for all other agencies).

163. See DEP'T OF THE TREASURY OFF. OF ECON. POL'Y, COUNCIL OF ECON. ADVISERS, DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (July 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [<https://perma.cc/67Z3-26CV>] (demonstrating the power

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 seek 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.¹⁶⁴ 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.*”¹⁶⁵ This holding, followed by many courts,¹⁶⁶ is supported by the relevant provision of the PRA, which says:

(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.¹⁶⁷

of the federal government to convene state and local government officials and recommending elimination of other forms of sludge).

164. See *Pac. Nat. Cellular v. United States*, 41 Fed. Cl. 20, 29 (1998).

165. *Id.* (emphasis added).

166. *Id.*; see also *Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 750 n.6 (D.C. Cir. 2014) (explaining that the PRA merely provides a defense, not a private cause of action, to those of whom information is improperly requested); *Smith v. United States*, 2008 WL 5069783 at *1 (5th Cir. 2008) (same); *Springer v. IRS*, 2007 WL 1252475 at *4 (10th Cir. 2007) (same); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 844 (9th Cir. 1999) (same); *Alegent Health-Immanuel Med. Ctr. v. Sebelius*, 34 F. Supp. 3d 160, 170 (D.D.C. 2014) (same).

167. 44 U.S.C. § 3512(b) (2012) (emphasis added).

The clear language suggests that the PRA requires only that an information collection have and display a control number, which shows that it has been approved by OIRA. There 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.¹⁶⁸ That 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 has historically been 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 open the door for other amendments, which may be uninformed or counterproductive. Nonetheless, some proposals deserve serious consideration.¹⁶⁹ It would make sense for relevant committees in both the House and the Senate to hold hearings on the topic. In particular, three reforms would do a great deal to improve the current situation.

First, Congress should require a periodic “lookback” at existing paperwork burdens to see if the current “stock” of requirements can be justified and to eliminate those that seem outmoded, pointless, or too costly. This reform would build on existing lookback requirements for regulation in general.¹⁷⁰ With respect to paperwork burdens, the lookback could occur every two years, alongside a requirement of a publicly available report to Congress. That report could be combined with the currently required ICB.¹⁷¹

Second, Congress should explicitly require agencies to choose the least burdensome method for achieving their goals. This is essentially a requirement of cost-effectiveness. If, for example, annual reporting

168. 42 U.S.C. § 706.

169. See Stuart Shapiro, *The Paperwork Reduction Act: Benefits, Costs and Directions for Reform*, 30 GOV'T INFO. Q. 204, 208–09 (2013) (proposing reforms to the PRA to focus on review of information requests requiring public participation).

170. See Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579, 592–96 (2014)

171. See *Information Collection Budget of the United States Government*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/#ICB> [https://perma.cc/SJZ9-PRP9].

would be as effective as quarterly reporting, then agencies should choose annual reporting. As we have seen, current law can be understood to require cost-effectiveness, but an explicit legislative signal would do considerable good.

Third, Congress should explicitly require the benefits of paperwork 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 regulation in general, it is important to appreciate the difference between cost-effectiveness and cost-benefit analysis.¹⁷² The former requires 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 particular goal?¹⁷³ A burden might be cost-effective but nonetheless fail cost-benefit analysis—and therefore be a bad idea. In general, it is important to say that even if a burden is cost-effective, it should also be assessed in cost-benefit terms to ensure that it is worthwhile on balance.¹⁷⁴

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, understood in economic terms.¹⁷⁵ A paperwork burden may or may not generate *social* benefits, understood in those terms. 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 hours)¹⁷⁶ and of

172. For a clear account, see STEPHANIE RIEGG CELLINI & JAMES EDWIN KEE, *Cost-Effectiveness and Cost-Benefit Analysis*, in HANDBOOK OF PRACTICAL PROGRAM EVALUATION 636 (Kathryn E. Newcomer, Harry P. Hatry & Joseph S. Wholey eds., 4th ed. 2015).

173. 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 although 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.

174. For an attempt to justify this proposition, but with many qualifications, see generally CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* (2018).

175. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, Circular A-4, *Regulatory Analysis* (Sept. 17, 2003) <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> [<https://perma.cc/NCK2-VR9G>].

176. See Samaha, *supra* note 15, at 302.

economic benefits (in terms, perhaps, of dollars gained by the Treasury).¹⁷⁷ But that is not standard cost-benefit analysis. Or paperwork might be designed 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 not 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, understood in economic terms, but instead as entailing an assessment of *proportionality*. Are significant costs likely to serve significant purposes? What is the magnitude of the costs,¹⁷⁸ 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,¹⁷⁹ 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; in that regard, 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.¹⁸⁰

D. Sludge Audits

An advantage of the ICB 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 aggregates them. It is also highly visible.

For the moment, let us put its various limitations to one side. Many institutions should be conducting Sludge Audits. State and local governments should certainly be doing so. The same is true of a wide

177. For relevant discussion, see generally David Weisbach, Daniel J Hemel & Jennifer Nou, *The Marginal Revenue Rule in Cost-Benefit Analysis*, 160 TAX NOTES 1507 (2018).

178. On the importance of testing, see Memorandum from Cass R. Sunstein (Aug. 9, 2012), *supra* note 5.

179. *Id.*

180. Weisbach et al., *supra* note 177, seems to me an important advance, and in some ways it is quite generalizable.

assortment of nations in Europe, Asia, Africa, and the Americas. Transparency about sludge would be the first step toward reducing it. One of the advantages of Sludge Audits would be to 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 I have noted that a great deal of sludge comes from private institutions, for better or for worse.¹⁸¹ Such institutions should be conducting Sludge Audits of their own. Banks, insurance companies, hospitals, and publishers could save a great deal of money by reducing sludge, and they could improve the experience of people who interact with them. It is worth underscoring the case of hospitals, where sludge can not only create immense frustration but also impair health and even cost lives.¹⁸²

CONCLUSION

The idea of deregulation is usually understood as the removal of formal regulations—those governing the environment, food safety, and motor vehicles, for example. 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, a cost equivalent to about \$200 billion. For both rational actors and those who display behavioral biases (such as inertia and present bias), administrative burdens can impose excessive costs, frustrate enjoyment of rights, and prevent access to important benefits of multiple sorts. The \$200 billion figure greatly understates the actual impact, economic and psychological. Sludge infringes on the most fundamental rights; it can also cost lives.

In these circumstances, there is a strong argument for a behaviorally informed deregulatory effort, aimed particularly at paperwork burdens. Such an effort would call for reductions 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 and have very large effects for that reason. Where automatic enrollment is not possible, officials might use an assortment of tools: frequent reminders; simplification and plain

181. On worse, see AKERLOF & SHILLER, *supra* note 25.

182. For an illustration, see *id.*

language; online, telephone, or in-person help; and welcoming messages to reduce psychological costs.¹⁸³

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.¹⁸⁴ 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. To know whether sludge causes losses or gains, we will sometimes run into intense disagreements about values. But in many cases, such disagreements are uninteresting and irrelevant, and acquisition of the relevant information will demonstrate that sludge is not worth the candle. In the future, it should be a high priority for deregulation and deregulators, for one simple reason: its benefits cannot possibly justify its costs.

Time is the most precious commodity that human beings have. Public officials should find ways to give them more of it.

183. See HERD & MOYNIHAN, *supra* note 21, for a valuable discussion.

184. See *id.*