Public managers must understand that there are legal "gray zones"—areas where the law is ambiguous or silent on the actions they can take. Unfortunately, many public managers view the ambiguity and silence as a constraint, and thereby immediately foreclose many of the strategic options available to them. Instead, we argue that public managers should embrace the gray zone and explore its strategic possibilities by using some of the legal tools at their disposal. We offer a model of how managers can view and use the gray zone in crafting their strategies. Case study examples support and illustrate our prescriptions. This article begins our work of identifying some of the strategies involving legal tools and their relative advantages. These strategies move managers from the traditional static view of the legal environment toward a more powerful and effective action-dynamic view.

WHY PUBLIC MANAGERS SHOULD NOT BE AFRAID TO ENTER THE "GRAY ZONE"
Strategic Management and Public Law

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Public managers now recognize the critical importance of strategic planning for the management of effective public sector agencies (Bryson, 1988; Eadie & Steinbacher, 1985; Nutt & Backoff, 1992; Wechsler, 1989). For a strategic plan to work, it must consider the legal environment. Unfortunately, the strategic management literature merely accepts the law as a series of constraints and fails to examine closely how public managers can make instrumental use of the legal system in their strategic plans.

AUTHORS' NOTE: *We thank the many former agency directors who participated in this project. The authors alone are responsible for any perceived normative positions relating to executive action and strategic management in the legal gray zone expressed in this article. The authors contributed equally to this manuscript.*

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The public manager needs to be aware of the law and how it operates. But this means more than knowing what the law says and what the manager ought to do ("black-letter law").[1] Because the law is very often silent and ambiguous, managers need to make use of this "gray zone" when considering strategic management options. In so doing, managers increase the region of acceptable behavior and give their agencies a larger possible action space within which to craft their strategic plans. The strategic management process should include an exploration of the options implicit in the gray zone.

The ambiguity of the gray zone could result from vague political compromise, insufficient facts upon which a clear legislative decision could have been made, or a decision by a legislature to avoid making hard choices. Over time, public managers may want to use the ambiguity to enhance their options as new facts, research, experiments, public opinion, legislative opinions, coalitions, and resources become clear. In general, ambiguity in the statutes increases the potential for administrative discretion (Spicer & Terry, 1994), and in some circumstances, managers may want to avoid immediately making a preferred strategic option more explicit. Part of the value of ambiguity in law is that it can unite diverse interests and provide managers with options because problems change in structure and definition as other plausible interpretations are advanced.

Despite the fact that the creation of law and legal ambiguity is the product of social discourse and interpretation (Green, 1992), public managers are noticeably absent from this dialogue because of their simplistic understanding that they cannot act unless they have been told how to act. By default, managers have ceded the gray zone to the lawyers. As a result, public management has developed an excessive focus on legal norms, especially procedural due process, to the exclusion of managerial norms.

THE GRAY ZONE PROBLEM

Our view is consistent with Dimock (1980) who argues that before we can have dynamic administration, we must correct the balance of power between lawyers and public managers. With too excessive a focus on legalistic processes, government becomes overly formalistic and bureaucratic, stifling management initiative. For there to be dynamic administration, administrators need more freedom to become leaders, and lawyers need to have a more flexible view of government.

The difficulties owe, in large part, to how public managers and lawyers are trained and to how they think. Whereas schools of public management and public administration now include a course on administrative law in their curricula (Roeder & Whitaker, 1993), no course on the environment or management of public agencies is part of the law school curriculum. Melnick's (1992) observation on administrative law applies:

> Administrative law in the United States is almost entirely about courts. . . . But no one pays attention to the tasks performed by administrators, the agency's sense of mission, the conflicting pressures placed upon it, or even what happens after judges hand down their decisions. (p. 198)

The result is that private law norms dominate the governance of public agencies with limited attention to the effects they might have on public management. For example, Dimock (1980) points out that in the area of planning, managers and lawyers have two very different approaches; where lawyers look at plans like codes of law, managers see that there are all kinds of plans with different time horizons, purposes, and life spans. Managers view teamwork as essential because it allows participation, development of alternative strategies, and changes in agency direction (Bryson & Crosby, 1992). This is alien to attorneys, who are always interested in maintaining clear and distinct lines of authority and control irrespective of the consequences that this might have on initiative or morale. For managers, planning should always be as close to the problem as possible, whereas attorneys, in their search for authority, rules, and accountability, argue that planning should be done by the head of the department or the legislature. We suggest that public managers should understand that they have a broad set of legal tools at their disposal and that they should apply these tools within the wider context of the rules and responsibilities of the courts, legislature, governor's office, media, stakeholder groups, and the agency.

In this article, we develop a model of how public managers and lawyers should view legal constraints. The purpose for developing the model is simple: Before public managers can work comfortably with the legal instruments at their disposal, they must first have a normative model of their relationship with the law. Having argued that they can act upon the legal constraints in this gray zone, we offer normatively and empirically based prescriptions on how managers can use a variety of legal tools to advance their strategic agendas. Our goals in this article are to begin a discussion that informs the strategic management of public agencies by the insights of jurisprudence and to identify a broader range of legal tools available to the public sector strategic manager.

THE DELEGATION PROBLEM

The simplistic view of the relationship between law and public managers is that there is a distinct separation of powers between the legislature enacting law and the executive branch implementing that law. A corollary of this first concept is that public managers cannot act strategically until they have been told how to act. With such a clear separation of powers between the establishment of policy (as expressed by law) and its execution by managers, it becomes difficult to justify why public managers should practice strategic management at all.

These views are incorrect, as documented by the implementation and constitutional history literatures. Lipsky (1980), Mechanic (1982), and Ripley and Franklin (1986) have all written about the implementation problem. When one examines how law is actually made, it becomes clear that the creation of law is as much the result of the executive branch's interpretation and implementation of the law as it is the legislature's actions. The creation of the law, therefore, is the product of policy formulation (legislative branch) and implementation (executive branch) of that law. But even before these relatively modern social scientists discovered the implementation problem, constitutional and administrative law scholars have pondered the delegation problem.

The delegation problem is composed of two related concepts. The first concept is that the legislature cannot delegate its legislative power to an executive branch agency. Only the legislature can make law. This concept derives from a strict interpretation of the separation of powers, which would argue that the authority to legislate is strictly the domain of the legislature, whereas the authority to execute that law is strictly the domain of the executive branch. Assuming a delegation of power to the executive branch is valid, the second concept considers the question: Has the agency acted outside the scope of its delegation? Taken together, the delegation problem is this: If the legislature is responsible for enacting laws and the executive is responsible for executing the laws, how in practical terms can this be carried out? To what level of detail must the legislature spell out the actions that the executive can take?

A manager can take a simplistic view of delegation and conclude that because the law has not explicitly stated that an agency can do something, the presumption is that the agency should not act. Obviously, the more strictly this rule is applied, the more stultifying the results. If the logic is pursued to its extreme, we would have agencies without managers. Automatons would be acting upon the orders of a micromanaging legislature.

Rohr (1986) shows how the framers of the Constitution anticipated this fundamental question in the construction of a constitutional democracy. Both the discussions of the framers themselves, and the winning arguments of the Federalists, recognized the importance of Montesquieu's separation of powers. But rather than interpreting separation of powers as a strict separation, the constitutional framers opted for a "sharing of powers" interpretation. This is clearly evidenced by the many sharing of powers sections actually written into the Constitution, as well as the sharing of powers in the respected English system of government. Madison best stated the sharing of powers rule:

> [Montesquieu's] meaning, as his own words impart, and still more conclusively as illustrated by the example in his eye [England], can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. (*Federalist* 47, as quoted in Rohr, 1986, p. 18)

Each branch (or department) of government has a specific constitutional responsibility, which is then checked by shared powers with the other branches of government. This founding dialogue by the framers on the operation of the separation of powers principle gives legitimacy to the executive agencies' sharing of legislative powers. In American constitutional and administrative law, the responsibility for creating public law is shared by executive agencies, legislatures, courts, and the chief executive through an intricate system of checks and balances: Public managers are legitimate partners in the creation of public laws.

Over the history of the republic, the respective roles of the legislature and the executive in charting strategic directions for executive agencies have changed. As the public sector took on new responsibilities, legislation became more vague because legislators lacked the time and the expertise to deal with their new responsibilities. As a result, the legislature delegated much of its legislative power to the executive branch. As more of these legislative powers were handed over to the executive, the Supreme Court had to find conceptual mechanisms that allowed this delegation to take place but in a way that could still be harmonized with the notion of separation of powers. These early constructs included "ascertainment of facts," where the executive would be allowed to act once a factual precondition to act was found to be true by the agency. Stating the problem as a factual precondition implies that the subject matter expertise of the agency is required instead of the judgment and discretion of a legislature (*Field v. Clark*, 1892). The "filling in details" construct allows

the executive agency to act in more clearly delineating a broader congressional mandate (*U.S. v. Grimaud*, 1911). This construct also implies the necessity of agency expertise that follows a broad policy set out by the legislature. Finally, under the "fixing a standard" construct, the Congress could fix a meaningful standard for the agency to follow. Executive actions in basic conformity with that broad standard were considered as allowable delegations (*Buttfield v. Stranahan*, 1904).

With these legal constructs, the Supreme Court upheld many of Congress's broad delegations of power. This system operated well until the 1930s, when Roosevelt began to institute the New Deal to counter the effects of the Depression. Under the National Industrial Recovery Act (NIRA), the broadest powers to date were then delegated to the executive branch. Although the Supreme Court had tolerated loose delegations of power from the legislature to the executive up until this time, the Court held the NIRA delegation in the "Hot Oil" and "Schechter Poultry" cases as unconstitutionally broad delegations of power.[2] Had the Roosevelt administration not forced the issue with its court-packing plan, administrative law would be far different today. But the Supreme Court did respond to the threat and in subsequent review of NIRA legislation, the Court has allowed broad delegations of power.[3]

The point of this simple legal/political history of American constitutional and administrative law is to emphasize and illustrate that there is a sharing of powers in which both the legislature and the executive set policy or, in the parlance of the strategic management literature, create a *strategic plan*. As for the earlier mentioned corollary, managers do not have to wait for the legislature to act; they can work with the legislature in crafting policy. This sharing of responsibilities in making the gray zone explicit is legal, legitimate, and a practical necessity. The real question for managers, therefore, is not whether public managers *can* play a role—they *will* do so consciously or by default.

A BALANCE MODEL FOR STRATEGIC ACTION TAKING

Instead of a strict separation of powers, the guiding principle to strategic action taking, in the legal context, is that of checks and balances. Any strategic plan operating in the gray zone must strike a balance between three sets of values (Rosenbloom, 1983b):

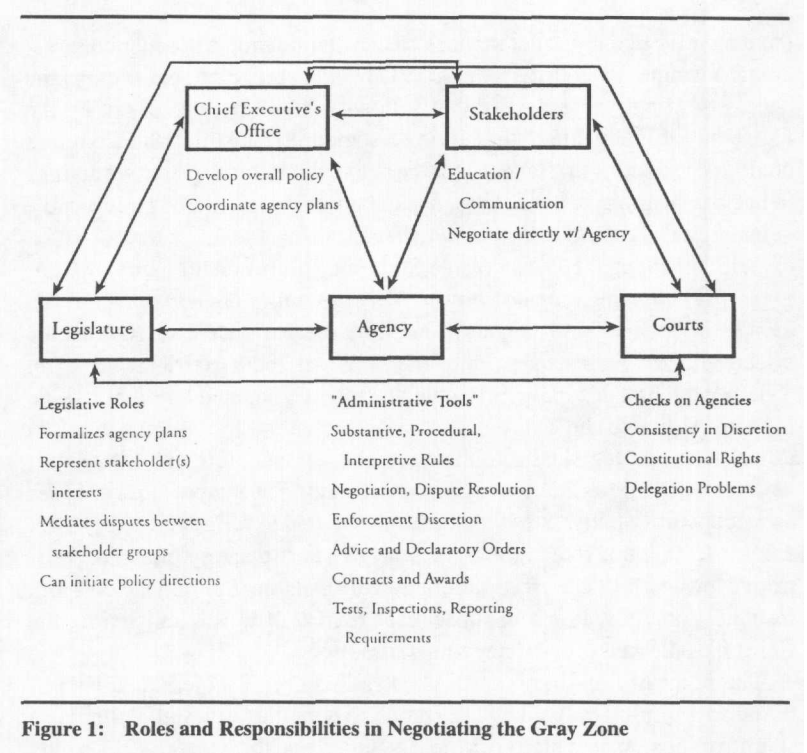

Figure 1: Roles and Responsibilities in Negotiating the Gray Zone

1. Respect for political norms, which includes representativeness, political accountability, and participation (represented by the legislature)
2. Respect for managerial norms, which includes efficiency, effectiveness, expertise, and experience (represented by the executive branch agency)
3. Respect for the law, which includes respect for the principles of procedural due process, substantive due process, equity, and equal protection (represented by the court)

Balancing these values requires operation in the nexus of Yates's (1982) administrative efficiency and pluralist democracy models of bureaucracy. Agencies must also be aware of the media (Allison, 1983; Rainey, Backoff, & Levine, 1976) and how they can help educate the public and mobilize a strategic agenda. The roles of these institutions as they relate to operating in the gray zone are presented in Figure 1.[4]

Our view of managers' strategic use of the legal gray zone, which we term the *action-dynamic view*, complements the agency perspective described by Wamsley (1990) and Wamsley, Goodsell, Rohr, White, and

Wolf (1992). In the agency perspective, the administrator is called to look beyond the concern for efficiency and the well-being of the bureaucracy to a

> concern for the public interest and the common good . . . [remembering] our agential role but to perform it strategically and pro-actively as a de jure subordinate with considerable autonomy and with different responsibilities from other officers but with similar constitutional standing in the governance process. (Wamsley, 1990, p. 154)

In their book advocating strategic management processes, Nutt and Backoff (1992) characterize public and nonprofit agency strategies on the dimensions of action and accountability. According to Nutt and Backoff, drifter, posturer, bureaucrat, and compromiser strategies are low-action strategies with varying degrees of accountability. Director, accommodator, and mutualist strategies are characterized as higher action and generally positive strategies, with the dominator strategy high-action with low accountability.[5]

The importance of a balance model is seen in Nutt and Backoff's (1992) four high-action strategies, especially the dominator strategy. The dominator strategy has insufficient concern for political norms for representativeness, political accountability, and participation and insufficient respect for the law, which includes the values of procedural and substantive due process, equity, and equal protection. The dominator strategy illustrates how the action-dynamic view can misfire without balancing managerial norms for representativeness and respect for the law. Even though we advocate aggressiveness in acting in the gray zone, our model is a balance model, with respect for these other values.

In the remainder of this article, we present actual strategic choices by state agencies using these legal tools,[6] showing some of the implications this institutional balance approach has for strategies that could be pursued. We offer some prescriptions to managers on how to use the law to advance their strategic agendas. The prescriptions are deduced from the normative balance model and substantiated and illustrated from case-based research, described in the next section.

HOW DO PUBLIC MANAGERS CONSIDER THE LEGAL ENVIRONMENT IN THEIR STRATEGIC PLANNING?

In the context of a research program on executive transition processes and state agency management, directors discussed how they approached

the achievement of policy objectives during their tenure as director. Interviews were conducted with 23 current and previous directors of 16 cabinet-level agencies in Ohio on the topic of executive transitions and management of state government agencies (Orosz, 1991). The directors' backgrounds were varied: political, general administrative, or specialized policy expertise. Experience with the legal system, including legislative experience and legal training, was noted. Agencies varied in appointing structures, levels of performance and stability, and function: policy, service, regulatory, and internal service. The population for the study includes nearly 30 of the major executive agencies of the state of Ohio. During this time, Gov. Richard F. Celeste took office in January 1983 and was reelected to a second term.

Unstructured interviews occurred between March and August 1990, ranging in length from 50 to 160 minutes depending upon the schedule and interest of the participants. Transcripts of these interviews were produced, and data were analyzed inductively, borrowing techniques from the grounded theory method of Glaser and Strauss (1967), as elaborated by Strauss (1987) and Strauss and Corbin (1990). We modified this approach with other inductive data analysis approaches (Denzin, 1989; Werner & Schoepfle, 1987).[7]

In reviewing interview transcripts, we identified distinctions in assertiveness that the agency directors took regarding the gray zone. These differences were evident both in general discussions about public sector leadership and strategic management as well as in specific questions concerning the approach to the legal environment.[8] We identified patterns in approaches to the legal environment by the directors—across successive directors within a single agency and across agencies with different functions.

These distinctions reinforce the argument we have made above for action in the gray zone. The areas of distinction include: *focusing through legislation* (perceiving the relationship with the legislature and initiating changes to the statutes), *focusing through administrative action* (e.g., pushing the boundaries of the law through the definition and extent of assertiveness in exercising administrative discretion; and working within the law through administrative rules and procedures), and *focusing through judicial action* (e.g., the use of lawsuits to define policy). These differences in approaches coincide with different views and practices concerning the role of agency legal counsel and in the perceived constraints of the legal system. Table 1 compares the traditional view with the action-dynamic view in uses of the various legal tools, associated environmental/

TABLE 1
Alternative Approaches to the Legal Environment: Legal Tools

Approach to Gray Zone	*Role of Legal Counsel*	*Philosophy of Litigation*	*Statutes/ Perceived Relationship With Legislature*	*Administrative Discretion: Approaches and Limits*	*Environmental/ Agency Conditions*	*Strategy Linkages*[a]	*Responsibility for Strategic Direction*
Traditional view	"Traditional lawyer," protective	Lawsuit avoidance (Do not violate legal mandate)	Policy follows changes in statutes	Minimize discretion to extent feasible	Stable—limited change	Drifter, posturer, bureaucrat, compromiser (low action or negative strategies)	"Muddling through," balance of power to legislature
Action-dynamic view (with strong issue agenda)	Policy lawyers: proactive as policy advocates	Litigation as policy: "Sue me." Lawsuits as strategic instruments	Statutes implement and support policy initiatives	Discretion used to further policy agenda—risk taking for purpose	Changing—dynamic	Dominator, director, accommodator, and mutualist (high-action or positive, transformational strategies)	"Systemic change," shared responsibility with legislature, or leadership role to agency

a. See Nutt and Backoff (1992, pp. 87-98) for a description of these strategy types.

agency conditions, balance of responsibility for strategic direction, and linkages to strategy type.

The question for managers is what tools are at their disposal to negotiate the gray zone as a way of advancing their strategic plans. We use the words of the directors to illustrate the differing approaches to legislation, administrative action,[9] and judicial action, including attitudes toward the gray zone and how they used the legal tools at their disposal. We find that directors considered most successful in achieving major policy change take a more proactive approach toward the management of the legal environment and its gray zones. We cite examples of dynamic and static agencies.

FOCUSING THROUGH LEGISLATION

Before describing the particular legal tools available to the strategic manager, we first consider a precondition for the use of the tools: the managers' attitudes toward the law. We provide examples of different approaches and decisions concerning legislative agendas. The first two examples show the movement of state departments from "at rest" legislative stances toward proactive legislative agendas. The first case reflects a response to a director's policy agenda for the agency, and the second case reflects a response to threats from the organization's environment. The director of the Department of Mental Health describes the department at the time she assumed leadership following a gubernatorial change:

> They [the agency's prior administration] had been pretty much managing as opposed to leading and directing, I think. And I don't mean to say that so much as a criticism, just as a description of difference. They had been operating the department, and doing all the things that you need to do to operate a department, not necessarily thinking about institutional change, or major [legislation] or values, or policy directions.

The case of this director is used throughout this article. Educated as a lawyer, she went on to actively pursue a major change to the state's mental health legislation, using a transformational strategy (see Frost-Kumpf, Wechsler, Ishiyama, & Backoff, 1993, for a review of the department's overall strategy).

A second case, an agency at rest legislatively, is exemplified by this statement from the executive of an agency with coordinating responsibilities in higher education: "We simply just operate within a context of what is built as law and rules and authority, and we're an agency created by law,

created to provide that nexus between government and higher education." In response to environmental pressures for increased efficiency and accountability, this executive went on 2 years later to establish a task force that ultimately recommended legislative changes to expand the authority of the agency. The leader's initial statement reflects an agency that is between environmental threats. The later strategic direction is an attempt to blunt threats from those outside the higher education system.

Each of these leaders used strategic planning processes to build external support for legislative changes, an important linkage between strategic planning and the law. The second example illustrates the typical strategic management approach to changes in legal statutes; actions within a broader strategy to influence the legislature as organizational stakeholders (Nutt & Backoff, 1992). The primary reason executives embark on legislative programs relates to major policy initiatives—changes in strategy needing formal legislative approval.

Another important distinction between the traditional legal view and the action-dynamic view in approaching the legal environment is the perception by the leader and relevant stakeholders of whether laws are dynamic or static. Recently, one director pointed out that the statutes are termed the "Revised Code," meaning they should continue to be revised. This attitude is exemplified by the following:

> It's not changing statutes as much as making changes, where if 440 [an earlier bill resulting in major reforms to agency operation] is affected by it or modified by it, that's just an outcome. The goal is not focusing on 440, the goal is what needs to happen. Times change. 440 was 1980. That's a decade away. You can't tell me that it's still viable. . . . It's like they wrote the Bible on the tablets and you don't change that.

Even if agency leadership is oriented toward policy change, the time required for legislative changes is a concern. The need to get changes accomplished within the tenure of the executive is one force suggesting that an executive should accomplish changes without modifying the legislative statutes.[10] Given the abbreviated tenure of state agency executives (Olshfski, 1989; Orosz, 1991), the accomplishment of a strategic agenda requires strategizing on the timing of statutory changes in need of legislative attention.

An alternative reason supporting the use of a legislative process is the interest in making changes permanent. Institutionalizing a policy by formalizing it as legislation makes it more difficult for the subsequent administration to change strategic direction. The director of a mental

retardation and developmental disabilities agency spoke about his efforts to make policy changes during his tenure. Having served for many years in the state legislature, he described his approach to managing the agency's strategic direction, what he termed "the last great civil rights movement":

> I started preparing for the next administration probably 2 years ago, maybe in an unconscious fashion, but I know that change is inevitable. I have a certain value system, which I hold near and dear to my heart. What I would like to see happen is [have] that value system implemented by my successor. You can do that in a number of ways, you can do it through law, you can do it through rules, you can do it through your staff, you can do it through programs, the implementation that will be very, very difficult politically to change, and we've done all that, I don't know what else I can do. . . . So it's that kind of institutionalization that we try to address and there [are] some law changes that we are trying to put into place which enable us more latitude in terms of residential services. Whether we use it all or not is irrelevant, the next people will handle it.

Another agency director practiced an alternative legal strategy by working to clarify legislation. She explained that one role for the agency was to work with the legislative leadership and affected parties to clarify legislative intent, by providing a "contextual statement":

> [A state department] had been drawing rules for [a new program] and I had been paying some attention to that. . . . So I went with my policy statement in my hand. . . . I said . . . "look at how it might be possible to make something like this work if we have some ground rules and contextual statements so that people understand what this program can or can't do. And here is our suggestion," and passed it out. The legislator said "that's what I meant when I passed that law." And do you know what they did? They amended the law from our statement. . . . Now we've played our role. . . . We think up the framework.

The leaders in our study acted toward the legislative arena with various intents and approaches. When the agency is adrift without direction or steady in its existing course, it seems legislative initiatives are not taken. When faced with threats from the environment, dynamic executives approach the legislative arena by organizing stakeholders to recommend changes in legislation, engaging in strategic plans that lead to overhauls in legal statutes, and working with legislators to shape the context for clarification in legislation.[11] Leaders who were successful in policy changes were active in the legislative arena, but generally after the direction for the organization was set internally or through a strategic management process involving stakeholder groups, including the governor. The dynamic administrator in pursuit of policy change viewed the statutes as change-

able and as following or enabling policy changes. Whichever strategy is pursued, it is important not to ignore the fundamental political values of representation, accountability, and participation.

Based upon our earlier model and case studies, some simple prescriptions emerge. Legislation would probably be undertaken where there is a major policy initiative. The courts would demand that, where a policy is changing dramatically, the agency identify why the policy is being changed so rapidly. The court would be concerned about a possible abuse of discretion. The legislative route would also need to be taken where the dynamic manager needs to have the strategy formally and symbolically approved by the legislature. Other situations requiring legislative involvement include major policy changes or strategic changes that are not revenue neutral (and thus affect the resources others may desire) or that directly affect another agency's jurisdiction. In these cases, the legislature mediates disputes among stakeholders and agencies.

Uncertainty is the downside of the legislative route. Even if the agency, the stakeholders, and the chief executive all reach agreement on a particular policy and seek to formalize this agreement through legislation, the political gaming that occurs in the legislature may unravel the agreements that are struck. A fragile agreement among the stakeholders may not survive the many years it often takes for legislation to be passed. Not only can the processes of the legislature unravel a new policy direction but legislative interest could go even further than the agency managers want, perhaps to the examination of other agency initiatives. So although legislative involvement gives agency plans instant legitimacy and guidance, the uncertainty of putting a new strategic initiative into the legislative arena must also be considered. Strategic managers may also be short of time or the resources to push such actions through the legislature. The timing and nature of strategies (which can occur simultaneously) using the gray zone of the law should be part of the strategic plan.

PUSHING THE BOUNDARIES—DIRECTION THROUGH ADMINISTRATIVE ACTION

Working within the existing statutes is the second alternative in the strategic management of the legal gray zone. Writers considering public-private differences and public sector management have generally perceived legal boundaries as constraints (Allison, 1983; Bozeman & Straussman, 1990; Perry & Rainey, 1988; Rainey, 1989; Rainey, Backoff, & Levine, 1976; Ring & Perry, 1985; Roberts, 1993).[12] We find that public managers

who are energetic in changing strategic direction actively push the limits of the laws. An important distinction in directors' management approaches is their willingness to push the boundaries of the law to achieve policy purposes. This willingness to push the boundaries seems to require a sense of direction and strategy by the director. The executive of the Department of Mental Health, actively pursuing changes in strategy, provides an example of the aggressive use of administrative discretion. We asked her to describe some of her actions:

> Organizational change is a good example. Before the mental health act, which didn't pass until [19]88, the law specifically said what offices we had to have. And we changed them anyway. We had by law a commissioner, who by law had to be a psychiatrist. . . . So we reorganized, even though the law said we had to be this way. . . . *But there were times like that when we sort of pushed the edges and figured out a way to do what we wanted to do, anyway. Now there's a fine line between going so far that you are blatantly breaking the law, and we didn't do that. . . . I also took a view of the law, as the law is supposed to be there to make things right, and legal and helpful, not to be in the way* [italics added]. And I think I had a fairly strong sense that the legislature didn't care that much about the offices, what they cared about was the functions, and they cared that there was a psychiatrist there . . . those are the things that they cared about, and other departments they had changed recently from having specific offices in law to more functions and then letting the department do the organization the way they wanted.

This approach of a leader and agency actively engaged in policy redirection is contrasted with the description from a director of a regulatory agency that tried to keep a low profile: "The agency's structure is mainly set by statute. The director doesn't have flexibility to just go about and do that [make changes to the organizational structure]."

Our first example shows a director with a perceived need to change the structure of the agency to achieve the policy initiatives and new direction of the department. Our second example shows the traditional attitude in which legal statutes and existing organizational structure are perceived as constraints. Of course, statutes can be written with varying degrees of specificity, which influences the director's judgment concerning latitude and discretion. But if the manager is going to be concerned about enlarging the strategic action space, the manager must first have an attitude that the law should not be taken as a constraint, but as another variable in implementing a strategic plan. Taking this attitude further, the executive may see exploiting the ambiguity of the law as a legitimate strategy.

History and tradition may also cause an agency to diverge from a legal mandate. The agency can return to the statutes to correct practices that are in discord with the law:

> People assume a lot of things because a practice develops and through tradition and history, it kind of changed things. And I say, wait a minute, this isn't what's supposed to happen. "Well, this is the way we've done things." And I say, that's not what the law says.

The use of administrative discretion is related to the willingness to push the law to expedite changes in policy direction. Here again, we wanted to know the limits of discretion: In what circumstances is it considered appropriate to push the limits, from a director's perspective, and when is it not? In their responses, these directors related to the question of pushing the limits of existing statutes as well:

> I think there is room for administrative discretion, and I rely very heavily on legal counsel to indicate to me those areas in which I have administrative discretion. . . . It isn't just black and white, yes you can, no you can't. I will say to legal counsel, . . . "what are the degrees of freedom?" . . . And if you don't abuse that, and you use it to the benefit of people that the system is supposed to serve, you're not going to get called on it.

> There's only been one or two times when I thought it was really questionable whether or not we could legally do something that we wanted to do, but I thought it was right programmatically, and it wasn't like it was illegal in the sense that you're not supposed to give money to your friends. It wasn't that kind of stuff, there would be very fine lines where you could probably argue pretty strongly that we couldn't do something that programmatically for the clients was the right thing to do. And I probably took a couple of risks by going ahead and saying "we're going to do it anyway, let them sue us."

> You don't do anything illegal, or if you do, you know damn well why you did it and exactly what the theory is upon which you did it, and [you] make sure it's client-based and not personal.

An organizational stakeholder of another agency described the approach of the agency's leader, who was generally perceived as having made policy changes (and who consciously "worked the law" as part of the strategic planning process):

> [He] wasn't very cautious. He stretched the law, like starting [a new program]. He did a lot of things like that. . . . Whether it was legal or not, . . . he did a lot of things that he said, "I think this is right and whether you're going to argue [with me] whether it is right or wrong is immaterial." He [took action], and I think that's the type of thing you have to do when you're

> [director], you gotta do what has to be done. I think part of the key is motivation, having not a personal agenda, but trying to do a good job. The ones that I see get in trouble, particularly in politics, are those that have [their own agendas].

The subject of our article, the gray zone, is specifically defined as those areas where the law is ambiguous or silent on the actions that managers can take: We do not advocate in any way the violation of the law. The key for the public manager is the degree to which the law is subject to varying degrees of interpretation. If the law is explicit with little interpretation possible, actions by the public manager contrary to the prevailing interpretation would be breaking the law. The decision to break the law because of ethical considerations is also possible but outside the scope of this article. If, however, the law is ambiguous, the public manager can take an active role in exploring the ambiguity of the law to achieve the public good. We provide examples of the range of approaches found in our study, without making judgment if legal boundaries were crossed in specific circumstances.

The directors in our study who "pushed the limits" of the law did so on the basis of clients' welfare or for reasons of public policy rather than personal gain. Other factors seem to affect how often and how far agencies would go in this direction. One key reason is the extent to which managers understand that the ambiguity of the law is something that can enable a strategic plan. Top strategic decision makers who have legal training can easily see the ambiguity in the law, and that this ambiguity is an opportunity rather than a constraint in creating a strategic direction.[13]

The following legal tools have been created by the legislature or recognized by the courts as ancillary and necessary to the agency in fulfilling its statutory mission (Gellhorn & Levin, 1990):

1. Substantive agency rules, which have the force and effect of law but are originated and promulgated by the agency
2. Interpretive rules, by which the agency can interpret what an existing law requires (and hence give shape to the gray zone)[14]
3. Procedural rules, by which the agency declares how it will manage its own resources and people
4. The use and timing of settlement, negotiation, and alternative dispute resolution procedures[15]
5. Discretionary decisions allocating people and money to specific problem areas to reflect how the agency wishes to enforce the law (*Heckler v. Chaney*, 1985)
6. The design and nature of the application and claim process
7. The pattern and timing of the use of suspension, seizure, and recall procedures

8. The giving of advice and declaratory orders
9. The letting of contracts and awards of grants
10. The design and nature of tests, inspections, and reporting requirements

Each of these legal tools can be powerful in its own right and can be used by agency administrators in a strategic manner to act in the gray zone. As noted earlier, another important tool, managerial in nature, is the use of news stories, press conferences, and even "leaks" to inform the public. When pursuing strategic agendas, agency administrators should consider the full range of legal and managerial tools.[16]

Institutionally, the executive agency serves as a central source of administrative expertise and experience, which is complemented by responsiveness and accountability to the public's needs. Our constitutional administration requires that administrative discretion be exercised with the informed consent of the affected parties. The agency can learn of the public's needs as represented by the legislature, or agency administrators may prefer to work directly with other stakeholders, a fundamental procedure in strategic management approaches (Bryson, 1988; Freeman, 1984; Mitroff, 1983; Nutt & Backoff, 1992).

Whether the communication and negotiation takes place through the legislature, the courts, the chief executive, or directly through the stakeholders is dependent on strategic choices made by the manager. The agency can use the above legal and managerial tools to express new strategic directions without having to make legislative changes, while still reflecting the informed consent of the stakeholders. As long as the agency does not violate due process rights or violate express statutory prohibitions to the contrary, agency administrators can choose among these tools to achieve strategic ends.

NEGOTIATING THE GRAY ZONE THROUGH JUDICIAL ACTION

The courts must also be considered in defining strategic actions, because they review claims concerning abuses of discretion (Rosenbloom, 1994). Where the strategic manager pushes the boundaries through administrative action, he should avoid being pushed into litigation by having the strategic plan enacted into legislation. This will go far in insulating agency action from negative court review. In setting new strategic initiatives, it is especially important to reasonably explain why there should be a change of policy, lest these actions be interpreted by the court as an abuse of discretion. Alternatively, if negotiations or agreements among stake-

holders break down or the legislature is too slow to act, stakeholders may desire to force policy decisions by taking the agency to court. The rights of individuals are also important to the court. The court will be especially concerned where agency action in the gray zone in some way touches upon or threatens constitutional rights. If an agency were to be brought to court under this kind of cause of action, the court's decision would likely be adverse to the agency's initiative. The court could push the agency to honor a legislative mandate or to honor an individual right.

Although lawsuits are often perceived as threats, they can also be made a positive part of an agency's strategy (Bryson & Crosby, 1992, 1993; O'Leary & Straussman, 1993). In some cases, lawsuits may need to be pursued so that the court pushes the legislature. Many of the social policy advances of the 1970s were not legislative in nature but the result of the courts forcing the legislature to act (Rosenbloom, 1983a).[17] When the courts force a decision, the legislature must either acquiesce to the court's interpretation or clearly articulate what the law should be (Vinzant & Roback, 1994).

Agencies are now even encouraging stakeholders to initiate lawsuits against them (O'Leary & Straussman, 1993; O'Leary & Wise, 1991). Of course, having the court decide an issue is a gamble. Courts have limited capabilities to make policy decisions, and so their decisions have an element of unpredictability (Horowitz, 1977; Shapiro, 1988). This unpredictability can be an incentive for stakeholders to forge an agreement lest the courts make a decision unsatisfactory to both parties. The court cannot initiate a lawsuit but depends on individuals to bring cases to it; if the agency has satisfied its stakeholders, cases to keep the agency from acting are unlikely to be pressed.

In agencies that deal in regulatory matters or agencies with responsibility for benefit determination and administration, litigation is commonplace: as one director said, "I think it becomes part of the fabric." In some cases, litigation becomes more comfortable because agency directors also have the ability to initiate lawsuits on behalf of the departments. Lawsuits could be informally encouraged if there is a tie to policy objectives or reforms and client interests, as typified by this agency director's statement: "For the life of me, I'm begging people come and sue us. That might help us." Another example:

> In 5 years, maybe 6 or 7 times [I] said to external groups who were very upset about the impact of the law, "make a recommendation that they go to court with it." And then I wouldn't take it personally. I understood it, and maybe that's the way you've got to change.

Although encouraging lawsuits to break a stalemate is an option, it probably should be a last resort. Going through a lawsuit has costs that could interfere with an agency's other attempts to use the law strategically. Lawsuits can absorb significant amounts of time, money, and managerial attention. They can be demoralizing to agency personnel. If the agency is unsuccessful in a lawsuit, disgruntled stakeholders may be encouraged to bring still more lawsuits. Finally, losing a lawsuit may affect an intangible but essential asset that the agency is a trusted custodian of the public interest and has credibility to know, understand, and implement the spirit of the law. Once this goodwill or credibility is lost, if there is another potential dispute in a gray zone, the agency is now merely one of several parties to a disagreement rather than an executive agency speaking with authority and expertise. One director explained another philosophy of litigation:

> The tax department as a department feels that [its] responsibility is to bring in money. The code tells them that they are to look at tax statutes narrowly. And when you're in doubt, you usually don't come down on the side of the taxpayer. That's OK up to a point. . . . What happened is that you had a lot of litigation. There was a philosophy not just with my predecessor but historically in the department that when in doubt, litigate. I don't agree with that. That's not my management style. Mine is resolve. And if there's a real hole, then you go to the legislature and you get clearer direction from the legislature.
>
> But to say look, in this case the taxpayer isn't wrong, in this case we're not right, it's a gray area. Let's again evaluate what we're going to get when we litigate and if we're not sure of the results and we're not sure this is the best case to litigate, let's settle it.

As seen above, directors can choose to proactively avoid lawsuits. Several strategies are available, including using legal staff as organizational trainers. This approach is particularly used in human resource policy such as affirmative action, sexual harassment, and collective bargaining. However, these directors used legal staff for training in policy-related concerns:

> We've had to compromise and sign a consent decree here or there, but we haven't lost a legal case yet. Because my instruction to my staff is, "I want to be right, [so] don't tell me what I want to hear or what I want to do is right, if it's not. Just tell me and then whatever it is, we'll either, A, adapt our program accordingly or [B] we'll go over and try to change the laws." And we've done both.

> I spent a whole lot more time with legal counsel, trying to anticipate legal problems instead of waiting until there was a legal problem and then just

> handling the lawsuit. And we spent a whole lot more time advising our staff, both in the [field] and in the central office about legal problems, rather than waiting till a legal problem happened and then dealing with it.

Similarly, another director said, "What I've tried to do with legal counsel is utilize them at lower levels of management, so that you really don't have legal issues. I used them as trainers." The lesson from successful managers is to pick the important legal fights and avoid the trivial lawsuits.

Our conversations with agency attorneys and managers reveal a distinction between policy lawyers and traditional lawyers. Traditional lawyers see their main job as keeping the agency out of court and the public eye. There is a strong incentive for such attorneys to stifle any dynamic actions taken by an agency—when in doubt, stay conservative. Although traditional lawyers are knowledgeable about rule making and public records laws, they do not know about the broader policy issues that the agency faces. For traditional lawyers, any initiative, good or bad, may attract judicial attention, and so caution is advised over the benefits of strategic action taking.

Traditional lawyers can be identified by the lack of policy knowledge outside of the narrow understanding of what the law says. In many instances, these attorneys can be found in small agencies that do not develop in-house legal and policy expertise. Often, their attorneys are provided by the state attorney general's office and rotate through the agency for a short time period. As a result, these attorneys never develop the broader substantive policy, economic, and political expertise that allows them to advise their clients on how considerations of the law can fit into the strategic direction of the agency. Instead, they caution against imprudent action lest the agency be taken into the court.

Policy lawyers, meanwhile, have the tenure and experience to advise on the legal implications of a strategic direction. Policy lawyers may also be director or assistant director of the agency. Directors with dynamic policy agendas could use policy lawyers more than traditional lawyers, as did the director of the Department of Mental Health: "I brought in a lawyer to be our legal counsel who was both a lawyer and a good policy thinker. She ended up taking a lot of policy roles, as well as a legal role." Legal counsel becomes a part of the director's "innermost" circle:

> I can remember several times when there were questions about whether or not we could do certain things by law, and *I know that many people would probably look at that and say, well, unless it says we can do it, we can't do*

> *it. My theory was, if it didn't say we couldn't, let's do it* [italics added]. Or if it seemed to say we couldn't, let's fashion an argument for why we could, so again, because legal counsel was so good, and because I think I understood a little bit more about how to use the law, instead of saying to legal counsel, "can I do this," I would go to [legal counsel], "this is what I want to do, how do I do it?" She felt like her role [was] to help us fashion the legal way to do something. So, in most cases, it was a matter of building an argument, or it was a matter of doing it this way instead of this way, just sort of figuring out ways to work the law.

In contrast, the traditional approach to legal counsel, as seen earlier, can be expected to result in a narrowly construed legal opinion on an issue. Although it is the safe route because it keeps agencies out of trouble, it also creates agencies that are afraid to take risks and new policy initiatives. Knowing this, many of the directors said they only asked for attorney general opinions if they anticipated they would get their desired response.

We have identified the broad range of legal tools available to the public sector strategic manager and provided examples of their range of consideration in state agencies in Ohio. These tools include actions relating to legislation, administrative discretion, philosophy of litigation and use of legal counsel. We next reconsider the implications of a more aggressive approach to the gray zone.

BRAVING THE GRAY ZONE

Strategic management approaches in the public sector rely on process, through the involvement of stakeholders, to build legislative support for policy changes relating to an agency's strategic agenda. Specifically, legislative activities become one or more "action steps" in a particular strategy. Little attention, however, is paid to the full range of legal boundary choices that can facilitate a strategic agenda, working the gray zone either through legislation, through administrative action, or through the courts. Given time constraints upon the governor and agency director in state government, we believe the public manager must use all legal tools to get the strategic agenda under way. A former director described his leadership experience this way:

> It's a question of what you find in the tool box. If you open up the tool box and you've got legislative authority and money, you put those tools to work. If you open up your tool box and all that's there is a different set of tools, you work with those.

Our balance model draws upon the work of Dimock (1980) and a dynamic activist view of public administration. Although we clearly would not argue for managers to act illegally by violating constitutional principles or statutory mandates, we do argue that there are gray zones in the law in which it is not clear what is legally possible. Our view is that managers should embrace this ambiguity and use it to advance their strategic agenda. Rather than running from the gray zone because of fear, managers should jump into the gray zone because of the opportunities.

Explicit identification of the legal tools available to the public manager can move more leaders from the static traditional view of the legal environment toward the action-dynamic view that facilitates organizational growth and direction associated with positive strategies for agencies of government. Most important, however, is the attitude that managers have toward the law and its gray zones. If managers, informed by the insights of jurisprudence, see the ambiguity and silence in the law as an opportunity rather than a constraint, they can begin using the law to enable their strategic plans.

We hope that our discussion has shown that using the gray zone can advance a strategic agenda. Managers do, however, have to be aware that not everyone sympathizes with an activist agenda (Davis, 1969; Lowi, 1979; Spicer & Terry, 1994; Stewart, 1975). Some state courts (as compared to the federal courts) hold the opposite view: Unless a power has been explicitly granted to an administrator or agency, there is no authority to act. We believe that if managers possess a more sophisticated view of the separation of powers and take care to understand the checks and balances among the legislature, governor's office, courts, media, the various stakeholders, and the body politic, there can be a more dynamic and strategic, as well as legal and legitimate, advancement of the public interest.

NOTES

1. Black-letter law is an informal term for the basic principles of law generally accepted by the courts and/or embodied in the statutes of a particular jurisdiction (Black, 1990).

2. *Panama Refining Co. v. Ryan*, 1935 ("Hot Oil Case"); *Schechter Poultry Corp. v. United States*, 1935.

3. The only notable exceptions to this general rule are the delegation of the power to tax (*National Cable TV Association v. United States*, 1974) and the delegation to private parties of the power to regulate other private parties (*Carter v. Carter Coal Co.*, 1936).

4. Our model specifies actions in the gray zone that affect strategic management of agencies. The model builds on the work of Yates (1982, p. 164).

5. Specifically the negatively cast strategies are: the drifter strategy is characterized as a low-action strategy of use in a placid environment. The posturer is a low-action strategy of use with multiple low-priority issues in which proposed responses are not followed through. The bureaucrat strategy involves modest action using standard bureaucratic procedures. The compromiser strategy is useful in a turbulent environment in which action on multiple and conflicting issues is required beyond a bureaucratic response.

The remaining strategies reflect more deliberate action taking. The director strategy is appropriate in a disturbed environment, with high action and some accountability. The accommodator strategy is useful in a predictable environment, encompasses moderate accountability, and includes a commitment to act on a predetermined issue agenda. Finally, the mutualist strategy is a proactive strategy, appropriate in a turbulent environment, in which agencies collaborate with stakeholders to create new solutions to evolving problems. Hence, the mutualist strategy is high action, high accountability. See Nutt and Backoff (1992, pp. 87-96) for descriptions and examples of these strategies.

6. The discussion that follows does not differentiate between federal and state agencies. Traditionally, federal agencies tend to be given much more leeway than state agencies in how much they can work within the gray area. With more responsibilities being assumed by the states and the increasing sophistication of state government, this situation is changing. For a more full explanation, see Schwartz (1984) and Pierce, Shapiro, and Verkuil (1985).

7. Strauss and Corbin (1990, pp. 22-38) describe the grounded theory process:

> The grounded theory approach is a qualitative research method that uses a systematic set of procedures to develop an inductively derived theory about a phenomenon . . . [data] are analyzed systematically and intensively, often sentence by sentence, or phrase by phrase of the field note, interview, or other document; by "constant comparison," data are extensively collected and coded. The focus of analysis is not merely on collecting or ordering a mass of data, but on organizing many ideas which have emerged from analysis of the data.

8. The questions included in our interview guide were:

A. What experience have you had in terms of the legal environment of public organizations? How did you complement or draw on your legal expertise (use of AG and department legal advisors)? What influenced your choice, and would you do it differently?

B. What is your attitude toward the legal environment of the public agency? How close to the boundaries do you operate? Did you see the legal environment as an opportunity and use it? What is the nature of the tension with the legal environment? Did the threat of lawsuits or actual suits affect your actions?

C. How has your ability to lead become affected by the law? (red tape, rules)

D. What and how has the ambiguity or clarity of the law affected your ability to lead?

E. What changes in law have occurred during your administration? Which have you reacted to, which have you initiated, or both? (differentiate federal and state, statutory and case law). To what extent have you used case law?

9. The assurance of anonymity of responses to some directors had implications for the writing of this text. We have removed names and titles or made the reference more generic.

10. The appropriateness of the action-dynamic view of administration depends on electoral timing (lame duck administrations are unlikely to be active), the governor's agenda, and political concerns.

11. Thompson (1994) terms this approach the *policy entrepreneur* when describing the legislative success of Secretary of Health and Human Services Dr. Otis R. Bowen in expanding catastrophic coverage under Medicare during the Reagan administration. Teske and Schneider (1994) examine the emerging role of city managers as *bureaucratic entrepreneurs*.

12. O'Leary and Straussman (1993) and Bryson and Crosby (1992) are notable exceptions.

13. This notion of administrative discretion on behalf of clients is consistent with "action theory" and the "new public administration" in which the administrator has outcomes of clients as a foundation for responsible and ethical action (Burke, 1986; Harmon, 1981). We found the traditional, "legal" view of strict interpretation to be predominantly held by directors in the agencies. Perhaps personal legal liabilities of directors influenced the choices here.

14. Although the law is still developing in this area, the most important precedent on agency interpretation of its own statutory authority is *Chevron, U.S.A. v. National Resource Defense Council*, 1984. In this case, the Supreme Court proposed a two-part test to determine who should be presumed to have the controlling opinion on agency authority:

A. When a court reviews an agency's interpretation, the court must first ascertain whether Congress has *directly spoken to the precise question at issue* [italics added].

B. If however, the "court determines Congress has not directly addressed the precise question at issue," then the court can merely determine whether the agency's interpretation is permissible [note that it cannot review whether it is the right one—thus the Court must defer to the agency's interpretation and not substitute its own].

A full discussion of the full discourse on this area is beyond the scope of this article. To obtain a first reading on the subject see, Gellhorn and Levin, 1990, pp. 73-121.

15. These techniques are increasingly accepted. On the federal level, Congress has recently passed legislation to encourage the use of less formal procedures: the Administrative Dispute Resolution Act (PL 101-552) to encourage the use of alternative dispute resolution techniques; and the Negotiated Rulemaking Act (PL 101-648) to encourage the use of negotiated rule making. Under the Negotiated Rulemaking Act, for example, representatives of the agency and the variously affected interest groups can negotiate a rule. See Mintz and Miller (1991) for a more detailed explication of this legislation.

16. For example, agencies may use their enforcement powers to collect information from stakeholders in a problem area. Rather than taking the riskier approach of directly regulating the problem area, the agency's collection and dissemination of information may force the stakeholders or the legislature to address the problem. Whether this action strategy is good for a particular agency depends on contextual factors.

17. Although the Court should act to protect individual rights of individuals, the Court must also respect the separation of powers and not be so involved in the legitimate sphere of activities of the other branches of government (O'Leary & Wise, 1991; Straussman, 1986).

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