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Citation:

William H. Clune, Law and Public Policy: Map of an Area, 2 S. Cal. Interdisc. L. J. 1 (1993)

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Thu Jul 19 14:26:22 2018

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# ARTICLES

## LAW AND PUBLIC POLICY: MAP OF AN AREA

WILLIAM H. CLUNE\*

This article is an essay about the meaning of “law and public policy” and the complicated relationship between these two ideas. There is hardly a term more common in government than “policy”—public policy, policy analysis, and so forth. Especially since the advent of legal realism, legal discourse relies extensively upon “policy arguments,” referring to something both powerful and peripheral to the meaning of text. Governments pass laws and use them to effectuate policies.

The article also serves as the analytical framework for a course I developed in Law and Public Policy. In order to prepare the course materials, I had to define the subject and distinguish it from that of other courses; for example, why not simply teach a set of interesting topics in constitutional law and theory? Or, if policy has something to do with legal impact and sociolegal institutions, why not teach a standard course in sociology of law or law and economics? Some of the distinctive content of Law and Public Policy can be condensed as follows.

Policy seemed to be the dominant and relatively recent concept—having something to do with the material welfare of large numbers of

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This paper originated most visibly in a course I created for Gunther Teubner in the Law Division of the European University Institute (EUI) in Florence, Italy, in late 1985. Papers delivered at two conferences bear ancestral similarities (*see infra* note 105). Designing course materials and co-teaching a seminar on the welfare state with Joel Rogers also was an important influence, as was an earlier exercise in co-designing course materials in Constitutional Law with Neil Komesar. Also important were ongoing research and interactions with my colleagues in the Law School, in educational policy (principally the Center for Policy Research in Education, CPRE) and at the La Follette Institute of Public Affairs, where I teach the course in law and public policy.

Thanks to Bill Sarvay for valuable research assistance, Lisa Armstrong for superb technical support, and Alice Honeywell for editing.

people. Policy in this sense is the framework for modern free market economies and modern welfare states that regulate economic production, consumption, and exchange. Most law in modern states responds to the needs and consequences of vast, dynamic and autonomous economic infrastructures and systems. And modern legal institutions tend to assume a characteristic form, stable over time, functionally autonomous, a delicate balance between central guidance and decentralized action. As the child of social engineering in welfare states, law and public policy seems built upon a series of tensions and contradictions: central steering through decentralized action; the melding of the public and private sectors; the focus of policy on future consequences coupled with the law's reference to historical text; sophisticated social engineering lacking adequate means to deal with elusive human behaviors; fine-tuned policies emerging from a disorderly political system and disturbed by a sense of crisis, contradiction and disorder; and a proliferation of disciplinary accretions and interdisciplinary activities without a clear paradigm for research. Yet for all these conflicting trends a common theme also exists: the emergence of empowerment as a model for designing policies in many different areas.

These ideas will be explored further in the rest of this essay. When I say "map of an area," I am trying to suggest both the content and intellectual structure of this enormous enterprise. I discuss ideas and refer to scholarship not so much to fully explicate or precisely document them, but rather to sketch and begin connecting the main elements of a complete picture. In some ways, this is very challenging and very abstract, an exercise in meta-analysis. Yet, the ultimate purpose is also both specific and personal. Ideas about law and public policy are the common currency of a large part of our society and the universe of legal academic discourse. Since law school I have found this discourse, this universe, disconcertingly enormous, dynamic, expansive, fragmented, and chaotic (as though the modern economy is the "big bang" of social and economic life). The effort to simplify, clarify, and illuminate such a universe seems well worthwhile.

## I. THE PROBLEMATIC OVERLAP OF PUBLIC POLICY AND LAW

The phrase law and public policy is itself somewhat questionable because of a potential redundancy. By definition, all law is public policy, in that it is the collective will of society expressed in binding norms; and

all public policy is law, in that it depends on laws and lawmaking institutions for at least some aspect of its existence. For instance, every Supreme Court case of popular interest is automatically an important issue of public policy, regardless of its social impact. Law in the fundamental sense of a reenactment, or reinstitutionalization, of social norms<sup>1</sup> probably will remain forever a topic of considerable social interest and a source of popular entertainment (e.g., dramatic trials and everyday legal-ethical issues in *L.A. Law*).

In an equally important sense, however, the idea of a complete overlap conceals more than it reveals and obscures some of the reasons why many people attach enormous importance to the area of law and public policy. Let us try, then, to delineate a more limited area first by defining public policy, then law, and then considering the distinctive characteristics of legal institutions in this reduced area of overlap.

#### A. WHAT IS PUBLIC POLICY?

Public policy has the following characteristics:

(1) It is concerned with *welfare* or the well-being of people in material things and the essentials of life (e.g., food and health). It is not concerned with spiritual or cultural well-being, as was, for example, the law of Imperial China.

(2) It is heavily concerned with *production, consumption and high levels of economic performance*, and not, as might a different imaginable public policy, with passive enjoyment or the fundamental relationships of human beings.

(3) It is *result oriented*, or concerned with *real consequences*, rather than being driven by the meaning of text and philosophical justice.<sup>2</sup>

(4) It is concerned with *aggregate or group welfare*, and not, as law tends to be, with individual justice.<sup>3</sup>

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1. See generally Paul Bohannon, *The Differing Realms of the Law*, in THE ETHNOGRAPHY OF LAW (Laura Nader ed., 1965); see also 67 AM. ANTHROPOLOGIST 6 (Pt. 2) 1965.

2. The possible conflict between legal formalism and consequentialism is discussed below. I am not saying here that welfare state law is devoid of philosophical and ethical issues. But, while philosophical and ethical issues abound in public policy, consistent with the emphasis of policy on aggregate welfare, ethical issues either deal directly with aggregate welfare (for example, the redistribution of health benefits from the terminally ill to pregnant mothers) or concern the proper institution for making more individualized determinations (for example, when life begins and ends). This, of course, means that law and public policy are critically concerned with the expertness and representative character of decision-making institutions.

3. Regimes of individual freedom may be needed, however, as infrastructures to public policy; e.g., economic liberty, worker participation, and even human rights.

(5) It is *centrally driven* because the state inherits serious needs of people that are created by markets but not solved by them.<sup>4</sup> Thus, it does not include a policy such as dispute resolution, in the sense of a system for dealing with disputes that surface unpredictably from decentralized social contexts, like the neighborhoods and families.<sup>5</sup>

(6) At the same time that it is centrally driven, public policy is critically dependent on *decentralized action* to attain its goals. The need for decentralized action derives from three characteristics of public policy in the modern state: 1) the goal of economic performance at high levels, a goal that can only be achieved by the active cooperation of individuals and social units; 2) the growth of highly autonomous and interdependent social institutions that are themselves the product of modern economic development;<sup>6</sup> and 3) serious cost constraints flowing from the requirements of economic efficiency and thus favoring low-cost voluntary participation.

(7) The twin features of central control and decentralized action are in obvious tension with each other; this *tension between central steering and autonomous action* is the central problem of public policy.<sup>7</sup>

(8) It is *dependent on data* as a result of several of the preceding characteristics (the concern with aggregate welfare, actual consequences, high levels of performance, and sensitive social steering). More sophisticated systems of public policy have more sophisticated data systems (e.g., markets with price and aggregate indicators; science and technology with measurement and the scientific method).<sup>8</sup>

(9) It is concerned with both socially aggregated goals, like total social wealth and efficiency, and with the welfare of subgroups, sometimes called equity.<sup>9</sup> Public policy is concerned with both efficiency and

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4. This phenomenon is sometimes called market failure. CHARLES WOLF, JR., *MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES* 17-33 (1988).

5. But public policy may affect dispute resolution in dramatic ways: for example by changing the nature of claims, encouraging aggregation of claims (e.g., complex litigation) and informal dispute resolution as a less costly alternative.

6. See generally NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* 230-54 (Stephen Holmes and Charles Larmore trans., 1982).

7. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *LAW & SOC'Y REV.* 239 (1983); Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18 *LAW & SOC'Y REV.* 291 (1984).

8. See CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 11-12, 20-23 (1992) (role of data, specific hypotheses, values and ideology in social policy); see also *infra* note 50 and accompanying text.

9. See WOLF, *supra* note 4, for the assertion that equity is the primary market failure in a political sense despite the fact that inequity is not a lapse from aggregate economic efficiency—the

equity by virtue of its root concern in aggregate social welfare. Starting just from a concern with aggregate welfare, it is impossible to specify *ex ante* which group to focus on: the whole society or a large subgroup (e.g., women or African Americans). Indeed, so-called equity goals often are needed to foster aggregate efficiency, as when the economy requires the productive services of women, minorities, the poor, and uneducated.<sup>10</sup>

Some main areas of public policy fitting these characteristics are: economic policy (e.g., maintaining prosperity through economic policy); the environment (spillovers from production and consumption affecting welfare and depending on sensitive data); science and technology (where regulation is both essential and disruptive); human health and reproduction (e.g., drug use, over- and under-population); education and training (described tellingly as human capital);<sup>11</sup> immigration (the movement of human capital that also creates welfare problems);<sup>12</sup> political and military conflict (alternatively instrumental to and destructive of the underlying economic enterprise); and finally, the political organization that supports policy-making in all of these areas (including always-serious issues of budgetary shortage and priorities).

Although it is relevant for some purposes to divide these areas between economy/technology and human reproduction and socialization, attaching special difficulty to the latter,<sup>13</sup> in reality every area involves the organization of human behavior and serious problems resulting from the difficulty of attaining that objective.<sup>14</sup>

## B. ORIGINS OF PUBLIC POLICY IN THE MODERN WELFARE STATE

The social context for public policy as described above and the source of its historical and social plausibility is the modern welfare

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technical, neoclassical meaning of market failure. *See also* DANIEL W. BROMLEY, ECONOMIC INTERESTS AND INSTITUTIONS: THE CONCEPTUAL FOUNDATIONS OF PUBLIC POLICY 109-47, 181 (1989) (role of distribution in welfare and assertion that land policy that produces greatest growth in wealth also produces greatest inequalities); CHARLES L. SCHULTZE, THE PUBLIC USE OF THE PRIVATE INTEREST (1977).

10. *See generally* National Center on Education and the Economy, *America's Choice: High Skills or Low Wages!* (1990).

11. GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (1964).

12. *See generally* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991).

13. *See, e.g.,* CLAUS OFFE, DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS (1985); *see also*, Martin Lasden, *Apocalypse: Then and Now*, 18 STAN. MAG. 55 (1990) (discussing Paul Ehrlich's predictions about population growth and ecology).

14. *See generally* JAMES G. MARCH & JOHAN P. OLSEN, AMBIGUITY AND CHOICE IN ORGANIZATIONS (1982).

state.<sup>15</sup> Welfare states are characterized by enormous growth in total wealth and size of government.<sup>16</sup> Although the effectiveness of government is almost always a serious issue, the fundamental scale of governmental activity is due to the enormous spillovers and huge infrastructure requirements of gigantic and dynamic modern production systems.<sup>17</sup>

Practically every area of sustained, problem-solving interest in modern law originates in modern production systems and corresponding governmental activity. Modern economies are the product of coordinated social planning, including the legal infrastructure of markets (property, contract), creation of long-term stable demand (e.g., unemployment compensation, organization of basic resources and provision of infrastructure, and even the division of markets).<sup>18</sup> Environmental policy involves a confrontation between production and ecology as sources of welfare.<sup>19</sup> The big equity issues of modern societies (e.g., race and women's roles)

15. See generally J. ROY HAY, *THE DEVELOPMENT OF THE BRITISH WELFARE STATE, 1880-1975* (1978).

16. HUGH HECLIO, *MODERN SOCIAL POLITICS IN BRITAIN AND SWEDEN: FROM RELIEF TO INCOME MAINTENANCE* 1-2, 10-33 (1974); see also *THE DEVELOPMENT OF WELFARE STATES IN EUROPE AND AMERICA* (Peter Flora & Arnold J. Heidenheimer eds., 1984).

17. See generally KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1974).

18. See generally JAMES HURST, *LAW AND MARKETS IN UNITED STATES HISTORY: DIFFERENT MODES OF BARGAINING AMONG INTERESTS* (1981); JAMES HURST, *LAW & CONDITIONS OF FREEDOM* (1956); MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* (1984).

19. In one sense there can be no conflict between production of wealth and environmental protection because both material wealth and environmental quality are goods appreciated by human beings who can choose whatever combination of the two is most satisfactory. The problem, then, is institutional distortion that leads to an over- and under-representation of certain values, such as those favorable to the environment. Such distortions include the problem of external costs and free riders (e.g., acid rain and municipalities downstream of other municipalities' sewage), under-representation of future generations, and over-representation of certain subgroups of the population (e.g., if wealthy, politically powerful people tended to have a *carpe diem* philosophy because of the intense pleasures available from great wealth—the opposite supposition, by the way, of the new class hypothesis, which supposes that wealthy people are exactly those who can afford a cleaner environment).

Of course, ultimately, those favoring better environmental quality must find the institutions to implement their preferences or be doomed to failure (e.g., courts, referenda). This is why the institutional problem automatically converts into dual problems of cultural and political change; neither the underlying preferences nor the institutions that implement them can be held constant or assumed exogenous (preconditions immune from deliberate change). More democratic control of the environment might require intense attitude change, redistribution of wealth and redesign of political institutions. For these and other reasons, the idea of correcting representative distortions overlaps heavily with the underlying value questions. See ROGER W. FINDLEY & DAVID A. FARBER, *ENVIRONMENTAL LAW: CASES AND MATERIALS* 1-53 (1985); see also WILLIAM M. DUGGER, *RADICAL INSTITUTIONALISM: CONTEMPORARY VOICES* at xii (1989) (the economics of cultural evolution and social provisioning as the study of dynamic processes); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *STAN. L. REV.* 387 (1981).

are direct spinoffs of economic activity.<sup>20</sup> International law is dominated by economic issues.<sup>21</sup>

Modern societies also are defined and driven by the presence of large, autonomous, yet highly interdependent social institutions.<sup>22</sup> Markets and productive organizations develop a powerful internal logic (e.g., price, profit, global economic integration) that resists control from the outside. Technology and science operate through distinctive patterns of social organization and logic (e.g., universities, laboratories, the scientific method). Communications has its own powerful internal dynamic and corresponding institutions.<sup>23</sup>

Government, then, that grows as an institution to meet needs unsatisfied by the others, faces the challenge of achieving its goals while respecting social autonomy.<sup>24</sup> Words such as facilitation, enablement, and empowerment reflect the difficulty (as well as, in some ways, the excitement) of central steering of highly autonomous social institutions.<sup>25</sup> Achieving goals by decentralized action has become a primary focus of policy within large-scale, economic organizations.<sup>26</sup> However, government faces the additional problem of achieving the optimum balance through politics.

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20. Race as the product of the forced migration of an enormous agricultural working force and its subsequent re-migration to industrial centers. Obviously, I do not mean to say that race and gender discrimination are completely defined by their economic content. But the origins, scale, locus, and even the remedies for these problems are dominated by economic life. See generally Carin A. Clauss, *Comparable Worth—the Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 J. L. REFORM 7 (1986); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990); Scott J. South, *Metropolitan Migration and Social Problems*, 68 SOC. SCI. Q. 3 (1987).

21. See Susan Wels, *Global Integration: The Apparent and the Real*, 18 STAN. MAG. 46 (1990) (international law not yet keeping pace with economic integration; predominance of private institutions).

22. See Luhmann, *supra* note 6 (labelling this phenomenon as social differentiation).

23. Consider for example, computers and the so-called information society. See Wels, *supra* note 21, at 46 (asserting that communications technologies distinguish this period of global integration from previous ones).

24. Teubner, *Substantive and Reflective Elements in Modern Law*, *supra* note 7, at 239; Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, *supra* note 7, at 291-301.

25. See, e.g., Joel F. Handler, *Dependent People, The State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988); JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* (1986); ROSABETH KANTER, *THE CHANGE MASTERS: INNOVATION AND ENTREPRENEURSHIP IN THE AMERICAN CORPORATION* 156-179 (1983).

26. See, e.g., THOMAS J. PETERS & ROBERT H. WATERMAN, JR., *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES* (1982); PIORE & SABEL, *supra* note 18.

## C. WHAT IS LAW?

Law is, in the first place, an exercise of authority, a command expressing the expectation of obedience on its own authority; and law is fiat, an expression of the authority to command acceptance. Thus, at base, law is an act of politics, rather than custom or exchange (two other sources of social organization).<sup>27</sup> Law can and does use incentives to encourage action, but uses political authority (e.g., taxation) to create the incentives. Law can be, and is, the basis of exchange; but law uses authoritative rules of property to effectuate exchange. In the great divide between politics and markets, law is politics (and partakes of the enormous frailties of politics), even when politics is used as the foundation of markets.

Law is also an exercise of authority by the state, though there are countless law-like exercises of authority outside the state.<sup>28</sup> State authority is distinctive essentially in claiming to be the supreme authority, the authority with the right to command other authorities.<sup>29</sup>

Finally, law is structured to expand the freedom of some people and actions while restricting the freedom of others. Law is always at once liberating and confining, although, perhaps especially in public policy, law may strive for a favorable balance of freedom over constraint. Property, for example, grants powerful authority to the property holder, authority that confines the liberty of others. For example, an employer with a property right might dismiss workers from employment, or a union with property rights might prevent an employer from taking such an action (in either case with possible harm to the collective enterprise and other employees).<sup>30</sup> Regulations limit the available actions of property holders (e.g., to sell contaminated meat or build non-conforming buildings). Litigation rights allow some people and not others to bring

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27. CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 17-51 (1977).

28. Felice J. Levine, *Goose Bumps and The Search for Intelligent Life in Sociolegal Studies: After Twenty-Five Years*, 24 *LAW & SOC'Y REV.* 20 (1990).

29. LINDBLOM, *supra* note 27.

30. See William H. Clune, *Unreasonableness and Alienation in the Continuing Relationships of Welfare State Bureaucracy: From Regulatory Complexity to Economic Democracy*, 1985 *WIS. L. REV.* 707, 739 n.77; Richard A. Epstein, *Rights and Rights Talk*, 105 *HARV. L. REV.* 1106 (1992) (reviewing MARY ANN GLENDON *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991)). Richard M. Fischl, *Some Realism About Critical Legal Studies*, 41 *U. MIAMI L. REV.* 505, 516 (1987); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. LEGAL EDUC.* 518 (1986).

suit and thus constrain the liberty of defendants.<sup>31</sup> Redistribution of wealth is a significant exercise of authority that plainly enhances the freedom of some at the expense of others.<sup>32</sup>

In short, at the immediate instrumental level, law occupies an area of conflict of interests, though in a larger sense it may be designed to maximize collective interest and achieve social harmony.<sup>33</sup>

#### D. THE INFLUENCE OF PUBLIC POLICY ON LAW AND THE SHAPE OF LEGAL INSTITUTIONS

Having discussed the political direction imposed on law by the concerns of public policy, and the nature of law as a political instrument, it is now possible to discuss the influence of public policy on law, as well as the directions in which law is pushed and shaped by public policy.

Public policy pushes law in the following directions:

##### 1. *Structuring of Law Around Performance Problems in the Economy.*

At the simplest level, law will tend to be organized around major performance problems of modern economies: regulation of the economy, income transfers, health, education and training, employment, environment, and so on. Recall the earlier discussion of how major legal issues often conceptualized as focusing on equity (e.g., race and gender issues) actually arise out of economic activity. Recall also the point that the organizing concept of welfare embraces both efficiency (the welfare of all) and equity in the sense of the welfare of large groups. Finally, note that the focus of law in the big equity areas usually is some combination of redistribution and net social product.<sup>34</sup>

##### 2. *Social Cooperation and Net Positive Social Product.*

The ultimate concern of public policy with production pushes law in the direction of social cooperation and the production of a positive social

31. Consider, for example, bankruptcy and coercive debt collection. Theodore Eisenberg & Stephen Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Whitford, *A Critique of the Consumer Credit Collection System* 1979 WIS. L. REV. 1047.

32. Despite the seemingly obvious truth of this statement, this point of view has been much disputed in both jurisprudence and legislative politics; see, for example, the distinction between a labor law and a law affecting health, safety, morals, and welfare in *Lochner v. New York*, 198 U.S. 45 (1905); see also THOMAS B. EDSALL, *THE NEW POLITICS OF INEQUALITY* (1984); JENCKS, *supra* note 8, at 10 (conservative objections to safety net policies developed by Congress after the Johnson administration).

33. BROMLEY, *supra* note 9, at 42-43 (distinguishing conventions from entitlements).

34. See *supra* note 9 and accompanying text.

product. The goal of cooperation immediately raises a difficult management problem for law, which operates technically through a conflict of interest. In fact, the effort to push legal conflicts in a positive social direction probably is the central puzzle of law in the modern welfare state.<sup>35</sup> This puzzle is illustrated on a grand scale by considering how welfare states could be organized to permit high savings, productivity, and welfare benefits.<sup>36</sup>

### 3. *Persistence of Legal Structures Over Time.*

There is a strong tendency for legal structures organized around economic problems to persist over time. This tendency is due partly to the fact that the regulatory structure is complex and requires substantial investment and time to develop,<sup>37</sup> but even more importantly to the fact that the structure must create stable expectations to encourage high performance and net positive social product. In short, the structure must facilitate long-term social investment. In environmental law, for example, change in regulation presents serious problems for economic actors both in terms of long-run technical planning and investment and in terms of instability in the underlying scheme of property rights.<sup>38</sup> Other examples of persistent legal structures are the Uniform Commercial Code and civil rights laws.<sup>39</sup>

### 4. *Organization Around Large Social Aggregates.*

Besides extending over time, legal structures organized around economic problems tend to embrace large social aggregates. Partly this is due to the fact that economic organization puts large numbers of people in similar situations (e.g., debtors, consumers, employees). But the same kinds of economics that push in the direction of persistence also push in the direction of large social aggregates. Regulating small pieces of social

35. See John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 LAW & SOC'Y REV. 179 (1984) (discussing the prisoner's dilemma in regulatory enforcement).

36. Adam Przeworski & Michael Wallerstein, *Democratic Capitalism at the Crossroads*, in CAPITALISM AND SOCIAL DEMOCRACY 205 (A. Przeworski ed. 1985); Harold L. Wilensky, *The New Corporatism, Centralization, and the Welfare State*, in SAGE PROFESSIONAL PAPERS IN CONTEMPORARY POLITICAL SOCIOLOGY (Series No. 06-020) 7 (1976); Joel E. Rogers, *Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Laws*, 1990 WIS. L. REV. 1.

37. See BROMLEY, *supra* note 9, at 217 (stating that complexity of property rights reflects value of resource).

38. EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 294-96 (1982).

39. On civil rights, see, for example, James E. Jones, *Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process Under the Executive Order 11,246 As Amended*, 59 CHI.-KENT L. REV. 67 (1982).

and economic problems turns out to be hopelessly chaotic or at least extremely inefficient because of interconnections in the regulated terrain. An example is how tort law, with its concerns for accident compensation and prevention, is pushed in the direction of sophisticated safety regulation and social insurance because of extreme economies of scale. Compensation for accidents and illness can be made efficiently in the context of large social insurance schemes that avoid overlapping and socially unaffordable coverage as well as prohibitive marketing and transaction costs. Effective safety regulation requires sophisticated information and regulatory tools (e.g., data on accidents, techniques of product recall).<sup>40</sup>

### 5. *Capacity for Planning and Adaptation.*

Persistent legal structures create problems of inflexibility in regulating a rapidly changing economy. Thus, the legal structures that persist must also have the capacity to adapt and change.<sup>41</sup> For this reason, the legal structures will tend to accumulate stocks of expertise in such forms as expert agency personnel, outside academic experts, and congresspeople who acquire expertise in regulatory specialties. My own work on implementation regards implementation, in part, as a long-run process organized around a social or economic problem with multiple points of access allowing for adaptation and change.<sup>42</sup>

### 6. *Central Guidance Through Delegation and Decentralization.*

I have already mentioned the forces pushing public policy in the direction of central guidance achieved through decentralized participation. The consequence for law is a powerful push toward delegation and

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40. See generally, CHARLES NOBLE, *LIBERALISM AT WORK: THE RISE AND FALL OF OSHA* 176 (1986); STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* (1989); ANDREW TOBIAS, *THE INVISIBLE BANKERS: EVERYTHING THE INSURANCE INDUSTRY NEVER WANTED YOU TO KNOW* (1982); Neil H. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23 (1990); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985).

41. See Don Kettl, *The Perils and Prospects of Public Administration*, 1990 PUB. ADMIN. REV. 411 (1990); Teubner, *supra* note 7 (discussing the Habermas/Piagetian idea of learning capacity of the legal system).

42. See generally William H. Clune, *A Political Model of Implementation and Implications of the Model for Public Policy Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47 (1983); William H. Clune & R.E. Lindquist, *What Implementation Isn't: Toward a General Framework for Implementation Research*, 1981 WIS. L. REV. 1044; William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, LAW & CONTEMP. PROBS., Winter, 1985, at 7.

decentralization of authority.<sup>43</sup> This tendency is seen in many areas of public policy, including the environment,<sup>44</sup> occupational productivity and safety,<sup>45</sup> education,<sup>46</sup> care of the elderly,<sup>47</sup> and welfare.<sup>48</sup> Of course, the enterprise of guiding through delegation is fraught with difficulties, raising the problem of how to guide autonomous actors without destroying their autonomy. I suspect that the solution to this problem is somewhat different in each policy area but in general is capsuled in the idea of simultaneous loose-tight coupling highly decentralized systems that are tightly monitored from the center on a very limited number of criteria.<sup>49</sup> Note that central monitoring on limited criteria usually requires some powerful mechanism of collecting and simplifying information, such as by computerized data or prices.<sup>50</sup>

### 7. *Commingling of Public and Private Authority.*

Although earlier I took the position that law is essentially an act of public authority, the requirements of public policy push the law into relationships wherein the state must cooperate with the private sector.<sup>51</sup> The essential requirement of public policy is the active cooperation of institutions at a high level of performance, and the law obtains this cooperation through a complex process of signaling and incentives. Furthermore,

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43. As mentioned previously, this push is expressed through words such as empowerment, enablement and facilitation. See *supra* text accompanying note 25.

44. On pollution markets and interest group negotiation see BARDACH & KAGAN, *supra* note 38; John P. Dwyer, *Contentiousness and Cooperation in Environmental Regulation*, 35 AM. J. COMP. L. 809 (1987); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L. Q. 233 (1990); John P. Dwyer, *Overregulation*, 15 ECOLOGY L. Q. 719 (1988).

45. PIORE & SABEL, *supra* note 18; NOBLE, *supra* note 40.

46. On decentralization and choice, see Clune & John F. Witte, *Choice & Control in American Education* (1990); on educational vouchers see John E. Chubb & Terry M. Moe, *Politics, Markets, and Americas Schools* (1990); John E. Coons & Stephen D. Sugarman, *Education By Choice: The Case for Family Control* (1978); Charles L. Glenn, *Choice of Schools in Six Nations* (1989); Thomas James & Henry M. Levin, *Public Dollars for Private Schools: The Case of Tuition Tax Credits* (1983); Myron Lieberman, *Privatization and Educational Choice* (1989); Joe Nathan, *Free to Teach: Achieving Equity, and Excellence in Schools* (1983); Joe Nathan, *Public Schools by Choice: Expanding Opportunities for Parents, Students, and Teachers* (1989).

47. Joel F. Handler, *Community Care for the Frail Elderly: A Theory of Empowerment*, 50 OHIO ST. L.J. 541 (1989).

48. See, e.g., the modern emphasis on work incentives and training, ROBERT HAVEMAN, *STARTING EVEN: AN EQUAL OPPORTUNITY PROGRAM TO COMBAT THE NATIONS NEW POVERTY* (1988).

49. PETERS & WATERMAN, *supra* note 26.

50. See Schultze, *supra* note 9 (recommending market-like policy instruments and emphasizing the powerful role of price signals, especially in the long run); see also *supra* note 8 and accompanying text.

51. See generally CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975).

law in public policy areas is characterized by large amounts of communication and negotiation. One example is in administrative law with its formal process of hearings both about rules and the application of rules,<sup>52</sup> as well as various forms of informal access.<sup>53</sup>

#### 8. *Modification of Political Access in Light of Performance Requirements.*

One of the most important problems of public policy is the organization of the political system itself. Policy formation and adaptation depend on political decisions, but the political process often is organized in ways that result in ineffective, incoherent policies. Public policy thus exerts a continuing pressure on the organization of politics: creation of specialized agencies, redress of political imbalances, more orderly and coherent aggregation of interests, pressure on judges to recognize collective interests in the form of statutory purpose, and so forth.<sup>54</sup> Examples range from the grand architecture of representation in welfare states<sup>55</sup> to policy-making in specific policy areas,<sup>56</sup> to the inclusion of education professionals in instructional guidance.<sup>57</sup>

## II. REPRISE: LEGAL INSTITUTIONS AS THE INSTRUMENTS OF PUBLIC POLICY AND THE MARKET AS MODEL OF STRUCTURED BARGAINING

This section will address in a broader perspective the kinds of legal institutions that arise to meet the requirements of public policy.

First, observe the centrality of legal institutions. As an act of government, every area of public policy must be implemented through some

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52. For a critique of administrative complexity and recommendation of market incentives, see Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655 (1985).

53. See JOHN E. CHUBB, *INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY* (1985); see also Dwyer, *supra* note 44.

54. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Clune & Van Pelt, *supra* note 42.

55. See THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (1979); Rogers, *supra* note 36.

56. See, e.g., NOBLE, *supra* note 40 (discussing the inclusion of workers in safety regulations); Lemann, *The Unfinished War*, 262-3 ATLANTIC MONTHLY Parts I & II, (1988 & 1989) (discussing the War on Poverty).

57. David K. Cohen, *Governance and Instruction: The Promise of Decentralization and Choice*, in CHOICE AND CONTROL IN AMERICAN EDUCATION Vol.1 (William H. Clune & John Witte eds. 1990).

set of legal techniques and some set of legal decisionmakers.<sup>58</sup> Social and economic outcomes are achieved through legal instruments. Social engineering is accomplished through legal institutions. Thus, the overlap of law and public policy consists of the impact on aggregate social welfare of allocations of authority; more specifically, it consists of the design of relatively stable allocations of authority (institutions) aimed at improving aggregate welfare. Examples include: bankruptcy, property rights under a regime of natural resource preservation, pollution abatement contracts, institutional litigation designed to reform prisons, regulation and organizational empowerment designed to promote such ends as worker safety and care of the elderly, and the representative structure of the state itself (e.g., corporatism).

What, concretely, do such structures look like? In general, the structures are specialized adaptations of routine legal organizations and are, thus, rooted in general-purpose legal institutions such as legislatures and courts. In a given area of public policy, the institutional structure might be highly concentrated in an administrative agency. But implementation of public policy always involves multiple institutions (e.g., legislatures, agencies, courts),<sup>59</sup> raising a question about mechanisms of coordination. These mechanisms of coordination vary, from the oversight of specialized legislators,<sup>60</sup> to the problem-oriented structure of institutional litigation,<sup>61</sup> to the more loosely coordinated process of implementing a social reform statute.<sup>62</sup>

While the market is, in a sense, the granddaddy, or master model, of legal institutions in the area of public policy, it is hardly the exclusive instrument. Indeed, in some ways the central problem of public policy is to mimic characteristics of market exchange in areas where markets do not work. Markets, it was noted earlier, rest on legal structures and

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58. Neil H. Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981); Neil H. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984); Neil H. Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U. L. REV. 191 (1987); Neil H. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1988).

59. Clune, *A Political Model of Implementation and Implications of the Model for Public Policy Research, and the Changing Role of Lawyers*, *supra* note 42.

60. EUGENE BARDACH, *THE IMPLEMENTATION GAME* 273-82 (1977).

61. Theodore Eisenberg & Stephen Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

62. Clune, *A Political Model of Implementation and Implications of the Model for Public Policy Research, and the Changing Role of Law and Lawyers*, *supra* note 42; Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83 (1989).

achieve a high degree of central guidance (efficient allocation of scarce resources) through the highest degree of decentralized action (particular self-oriented exchanges).<sup>63</sup> This is Adam Smith's idea of the invisible hand that makes public virtue out of private greed.

But central guidance through invisible steering is also the goal of other areas of social policy—areas such as the environment, welfare, and education. Each area is looking for the optimal blend of central guidance and decentralized control operating through legal structures and techniques emphasizing decentralized decisionmaking. The idea of structuring the decision making of other social institutions through procedural requirements and property rights is at the heart of Gunther Teubner's article on reflexive law.<sup>64</sup> Thus, we should probably reconceptualize the private/public dichotomy to think about various kinds of state authority promoting a blend of central steering and decentralized participation, of which the market is a good, but far from the only, example.

#### A. THE MARKET AS MODEL

To understand the role of law in structuring largely autonomous action, it may be helpful to look more closely at the market model and consider the role of law in various kinds of exchange.

Borrowing from Macneil and Williamson,<sup>65</sup> exchange can be arrayed on a continuum from the discrete to the full-fledged total relationship, epitomized by marriage. For every type of exchange, legal institutions provide essentially two kinds of assistance: the basic charter (or authority) for the exchange, and rules for termination of the relationship and liquidation of assets and liabilities. In other words, the law provides the rules for getting in and getting out, leaving the substance of the exchange to the parties. Thus, in every exchange, practically all of the genuinely productive activity is extra-legal and depends to an important extent on the development of extra-legal trust between the parties.<sup>66</sup>

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63. LINDBLOM, *supra* note 27.

64. Teubner, *Substantive and Reflexive Elements in Modern Law*, *supra* note 7 (itself a synthesis of the work of a number of other theorists: Nonet & Selznick, Luhmann, Habermas); see also Thomas Palay, *Relational Contracting, Transaction Cost Economics and the Governance of HMOs*, 59 TEMP. L. Q. 927 (1986). On the idea of government modelled on the market, see DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT, HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992).

65. OLIVER E. WILLIAMSON, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (1985); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 712 (1974).

66. This is a proposition for which Professor Stewart Macaulay became famous. See A. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55

Let us look briefly at several types of exchange to illustrate these principles. For a simple contract (a discrete exchange projected into the future), the basic charter has two parts: the property rights in the assets and the option to bind oneself to an exchange in the future through contract. Property rights are the main security needed to enter the exchange because the market (other exchanges) is always available if one party backs out. The contract right is another incentive to invest in future exchanges because it gives additional protection against opportunism (backing out for a better deal that emerges after the initial agreement). If one party does back out, contract remedies provide a structure for liquidation of the deal (for example, in the form of expectation damages less mitigation). In some kinds of simple exchange, additional property rights and regulations are necessary to make exchange possible.<sup>67</sup> But, in any event, the exchange itself must be crafted by the parties; and in most cases, a continuing commercial relationship provides an additional non-legal basis for fair dealing: trust.

In certain kinds of long-term bilateral contracts (e.g., construction contracts) the law may provide security through arbitration. In others, such as franchising, security may require conferring a property right on the franchisee (for example, to encourage investment in the franchise and discourage wasteful conflict over termination).<sup>68</sup> The law also will do its best to liquidate the assets of the exchange equitably when the relationship terminates, but trust is even more important in this kind of contract, because the parties must rely on voluntary adjustments to handle a large number of unforeseeable problems.<sup>69</sup>

The firm, or business organization, provides another means of projecting exchange into the future, based mostly on the detailed supervision of employment. The law of business organization provides a basic charter for this kind of exchange. Employment rights and bankruptcy are

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(1963); see also 1985 WIS. L. REV. 461. The preponderance of formal legalities in poverty policy (e.g., rules of eligibility) is probably a pathological indication. See William H. Simon, *Legality, Bureaucracy, and the Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

67. Consider, for example, regulated securities and exchanges. See generally Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the Rule of Reason in Restraint of Trade Analysis*, 15 RES. IN LAW & ECON. (forthcoming 1992).

68. See generally A. Stewart Macaulay, *Long-Term Continuing Relationships: the American Experience Regulating Dealerships and Franchises*, (1990) (Working Paper Institute for Legal Studies University of Wisconsin-Madison Law School).

69. Thomas Palay, *Comparative Institutional Economics: The Governance of Rail Freight Contracting*, 13 J. LEGAL STUD. 265 (1984).

among the rule structures that govern termination. But, again, the substance and profitability of the exchange are entirely an extra-legal creation of the parties.<sup>70</sup>

In marriage, the license and ceremony provide a charter while dissolution is governed by the law of marital property, child custody, and divorce.<sup>71</sup> In marriage, we do not conceive of legal institutions as providing much help for the underlying relationship, as would be predicted by the theory of exchange from the uniqueness of the human capital, but a web of institutions (including the laws of credit, taxation, property and education) helps the family or household to serve as a unit of production and consumption.<sup>72</sup> So powerful is the influence of extra-legal activity that even as to the part of marriage most appropriate for legal regulation (property division and child custody on termination of the marriage), the law must encourage private bargaining to be most effective.<sup>73</sup>

#### B. A GENERAL FRAMEWORK: BARGAINING IN THE SHADOW OF THE LAW

The idea of bargaining with legal entitlements, developed by Mnookin and Kornhauser, ties together models of centralized guidance and decentralized action across the full range of legal interventions from market foundations to regulation. Giving people specialized, or structured, legal entitlements, and expecting them to trade the entitlements for their own benefit, may be the grand strategy of law and public policy, expressed as facilitation, enablement, empowerment, reflexive law, etc. Reich's advocacy of administrative hearings to protect the new property in welfare state entitlements is an early example of decentralization and empowerment.<sup>74</sup> The trick in this case is to push the bargaining toward aggregate welfare and efficiency despite the powerful influence of private objectives and bargaining power. The overall direction of bargaining

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70. Consider for example, the health maintenance organization. See Palay, *supra* note 64. But the productive activity consists of the legion of complex interactions within the firm. See, e.g., ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

71. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 959 (1979); June M. Weisberger, *The Wisconsin Marital Property Act: Highlights of the Wisconsin Experience in Developing A Model for Comprehensive Common Law Property Reform*, 1985 WIS. WOMEN'S L.J. 5 & Addendum 1-2.

72. See generally GARY S. BECKER, *AN ECONOMIC ANALYSIS OF THE FAMILY* (1986).

73. See generally Mnookin & Kornhauser, *supra* note 71.

74. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). See also Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, *supra* note 25.

(e.g., toward efficiency or irrational conflict) will depend on the recognition of parties, the shape of incentives and entitlements, the delivery of bargaining resources, and the characteristics of the bargaining forum (e.g., private exchange, adjudication).

Structured bargaining applies straightforwardly to regulation. An appropriate amount of enforcement prevents opportunism in the form of either noncompliance or legal harassment. The law also should allow flexible compliance. To get the most from regulation, however, the parties themselves must develop a mutually productive understanding through bargaining and trust.<sup>75</sup>

Almost all of the materials I have considered for the course in law and public policy fit this model of structured bargaining. Examples include: Estrich<sup>76</sup> (criminal law must reinforce right of woman to control sexual exchange through verbal consent); Weisberger<sup>77</sup> (principal purpose of marital property reform is to increase bargaining power of spouse without legal title); Whitford<sup>78</sup> (objective of law of creditors remedies should be voluntary settlement); Sugarman<sup>79</sup> (law governing accidents should encourage accident prevention and efficient settlement of claims for compensation); Bardach and Kagan<sup>80</sup> (market in pollution entitlements, or pollution abatement contracts, encourages voluntary reduction of pollution); Noble<sup>81</sup> (worker representation in government and factories maximizes occupational safety); Rogers<sup>82</sup> (broader, less fragmented representation of labor permits most profitable combination of wages and social savings); Komesar<sup>83</sup> (constitutional law seen as effort to balance welfare of majorities and minorities in various situations); Clauss<sup>84</sup> (rules of comparable worth must allocate decisions about women's pay between regulatory agency and employer); Schultz<sup>85</sup> (greater participation of women in work force requires remedies for making work hospitable to women and not simply a facially neutral application process); Clune and

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75. Keith Hawkins & John M. Thomas, *The Enforcement Process in Regulatory Bureaucracies*, in ENFORCING REGULATION 16 (K. Hawkins & J. Thomas eds., 1984); Scholz, *supra* note 35.

76. Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

77. Weisberger, *supra* note 71.

78. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047 (1979).

79. SUGARMAN, *supra* note 40.

80. BARDACH & KAGAN, *supra* note 38.

81. NOBLE, *supra* note 40.

82. Rogers, *supra* note 36.

83. Komesar, *supra* note 58.

84. Clauss, *supra* note 20.

85. Schultz, *supra* note 20.

Van Pelt<sup>86</sup> (special education law gives parents of handicapped limited influence in various kinds of decisions affecting their children); Handler<sup>87</sup> (dependent populations can be given carefully chosen rights and resources to increase their effective representation); and Goldstein<sup>88</sup> (problem-oriented policing consists essentially of giving police personnel information and resources needed to reduce level of criminal behavior as well as magnifying police resources by involving the community).

The role of law in these very diverse situations is to provide security for voluntary exchange and productive activity. In a fundamental sense, articulated by Habermas,<sup>89</sup> voluntary exchange is what we mean by collective welfare. The important questions then include identifying which kinds of exchange to encourage, which parties to recognize as voluntary actors, and how to provide legal security for the exchange. In this sense, a democracy is just as much a legally encouraged exchange as a real estate contract;<sup>90</sup> and a real estate contract is no less a system of political representation.<sup>91</sup>

### III. INTELLECTUAL AND DISCIPLINARY TOOLS AND PUZZLES

#### A. A CONFLICT BETWEEN LEGAL FORMALISM AND CONSEQUENTIALISM?

The first puzzle is presented by legal analysis and doctrine. What is the role of legal interpretation in a world where social performance, not meaning, is the touchstone for policy analysis? Is there a tension between legal formalism and social consequentialism, legal doctrine and social engineering, captured in Max Weber's idea of the rematerialization of law?<sup>92</sup> In public policy, does law collapse into transient utilitarianism,

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86. Clune & Van Pelt, *supra* note 42.

87. See sources cited *supra* note 25; Handler, *supra* note 47.

88. See generally HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* (1990). See also Wilson & Kelling, *Making Neighborhoods Safe*, 263 *ATLANTIC MONTHLY* 46 (1989).

89. See HANDLER, *DEPENDENT PEOPLE*, *supra* note 25, at 1068-71 (discussing Habermas and other theorists).

90. See generally Neil K. Komesar, *Law and the Character of Politics* (1990) (unpublished manuscript, University of Wisconsin Law School).

91. See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563 (1982).

92. 1 & 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 85, 86 & 656, 657, 809 (Gunther Roth & Claus Wittich eds., 1978); see also LUHMANN, *supra* note 6, at 122; Clune, *supra* note 42, at 104; Teubner, *Substantive and Reflexive Elements in Modern Law*, *supra* note 7, at 240. Note that consequentialism in Weber's sense was broader than material welfare, including, for example, ethical consequentialism. Weber might see danger, for example, in the absolute claims of various groups on the state and their complete unwillingness to accept the

losing its independence as a source of meaning shaping subsequent legal development and rights?

I believe that the opposite point of view is more defensible. Public policy has introduced an age of large, relatively stable legal structures whose essential terms govern a multitude of transactions over a period of years. Think, for example, of the implementation of equal employment law, or school busing. The meaning of such laws may be found mostly in the overall design of the program and its legislative history, rather than in common law-like exegesis of specific texts. But both meaning and vested rights—two hallmarks of law—are quite important to public policy (for example, the idea of social security as paid-for insurance and the stability of entitlements under environmental legislation). In my view, the relative autonomy of the law manifests itself not so much in the creation of social programs but in the momentum behind them once they are created, a momentum sometimes called institutionalization.<sup>93</sup>

Loss of legal meaning connects with public policy in some interesting ways. On the one hand, skepticism about legal arguments, first from legal realism, then from critical legal studies, is partially a facet of social pragmatism.<sup>94</sup> Critical legal studies extended this skeptical, pragmatic approach to the naïve social policy arguments of legal realism as well as to more recent, sophisticated policy analysis.<sup>95</sup> But within this trend toward practical language is a counter trend toward the isolation of meaning from experience.<sup>96</sup> The dense, intricate textual exegesis of some critical theory treats text as an object in itself and meaning as an interminable, subjective inquiry through contradictions, empty spaces, and shadows. Critical legal studies contain both thrusts often in the same article. For example, consider the assertion that legal texts are logically

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process of government as a legitimate way to resolve disputes involving these claims. *See* Epstein, *supra* note 30. Ethical absolutism may be a less benign form of consequentialism than benign welfare institutions (see also discussion of deconstruction and postmodernism below). On the other hand, ideas of individual choice and multiculturalism may be the political and legal versions of the emerging paradigm of empowerment.

93. *See* Michael W. Kirst & Richard Jung, *The Utility of a Longitudinal Approach in Assessing Implementation: A Thirteen Year View of Title I, ESEA* (Stanford University Project Report No. 80-B18 1980); JENCKS, *supra* note 8, at 19-23 (institutional reform of aid to single mothers and value of incrementalism).

94. Social pragmatism is the evaluation of concepts according to their consequences rather than their internal meanings. *See* G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819 (1986).

95. Kennedy, *supra* note 19.

96. *See*, in this respect, David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986).

meaningless but serve as coherent policy instruments for the dominant class.<sup>97</sup>

A movement of legal meaning simultaneously outward toward social consequences and inward toward literary self-consciousness is not surprising in light of the pressure of public policy on law.<sup>98</sup> I would guess that law has preserved the integration of the conceptual and the consequential most effectively in areas where social consequences are most observable. Consider, for example, the law of civil procedure where lawyers understand the consequences of procedural rules, and cases focusing on individual justice, which possibly help to explain the success of *L.A. Law*.

What about the opposite problem, the collapse of consequentialism into the formal arguments of law, when the legal system often adopts the rhetoric of social consequences with precious little regard for empirical realities (e.g., speculative policy arguments)?<sup>99</sup> One effect of the emphasis on public policy may be an increase in the appeal of consequentialist rhetoric without any corresponding gain in genuine effectiveness. Also, law and politics have purely symbolic or persuasive functions,<sup>100</sup> often inextricably mixed with an orientation toward actual outcomes. For example, a system like public education, which is under great pressure to demonstrate successful outcomes but possesses a relatively weak capacity to achieve them, may be pushed in the direction of manageable outcome indicators (for example, grade-level promotion or average yearly gains in achievement).<sup>101</sup>

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97. See Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984). Kelman writes:

Blackstone treats incorporeal hereditaments as a species of real property, although he carefully differentiates them from estates in land, even when they involve the right to receive the income that derives from land. Purportedly he treats them as property, because they are a "thing," though admittedly a "thing invisible" that cannot be delivered over from hand to hand (quoting Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 342-43 (1979)). But what on earth is an invisible and intangible thing? Is Blackstone simply mad or not the sort with the piercing intelligence we'd demand for a tenure-track appointment at a prestigious law school? But perhaps there is some order here: We must at least consider the possibility that this reification of incorporeal hereditaments permits Blackstone to extend very general "protection of civil peace" arguments for state protection of the possession of property to situations in which the arguments might otherwise seem mind-bogglingly inapplicable.

*Id.*

98. Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543 (1988).

99. See generally Gunther Teubner, *How the Law Thinks: Toward A Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727 (1989).

100. MURRAY EDELMAN, *POLITICS AS SYMBOLIC ACTION* (1971); MURRAY EDELMAN, *POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL* (1977).

101. John W. Meyer & Brian Rowan, *Institutional Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. OF SOC. 340 (1977); for related cites see Clune, *supra* note 42.

In general, the growth of social problem solving probably increases the need for political symbolism; the two activities increase simultaneously and complement each other, or they substitute for each other at the margin. I think, for example, of persuasive moralistic messages about drug use, or of how the accountability movement in education immediately provokes a cottage industry of public relations through the use of educational statistics.

But for every case of false consequentialism, there is at least another case of false formalism—formal legal reasoning—obscuring a deeper logic of social responsiveness.<sup>102</sup>

Two other problems of rematerialization will be addressed later in this article: the idea that failing to deliver actual results puts a strain on legal legitimacy,<sup>103</sup> and the often-discussed problem of political disorganization interfering with effective policy formation and implementation. One such problem is the fragmentation of traditional legal decision makers (e.g., judges and juries in tort cases).<sup>104</sup>

#### B. THE INTELLECTUAL ENVIRONMENT OF WORK ON LAW AND PUBLIC POLICY: DISCIPLINARY AND INTERDISCIPLINARY

The dominance of public policy in debate over government and law has created a fascinating intellectual environment. Increasing attention to public policy as a topic has broken down disciplinary boundaries through the expansion of disciplines and the rise of interdisciplinary studies. Policy is not just law, politics, economics, or social structure; it is all of them at once. Thus, students of policy find it increasingly necessary to be conversant with research in other disciplines. The result, however, is not an orderly discipline but a veritable riot of analytical techniques, conceptual frameworks and schools of thought. In this section, I will first comment on the general disciplinary and interdisciplinary climate of policy studies, with special reference to the law curriculum, and then briefly discuss some of the analytical tools created in the intellectual ferment surrounding public policy.

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102. For example, consider the assertion that the cost of educational services for the handicapped works its way into many different kinds of doctrine. See Katharine T. Bartlett, *The Role of Cost in Educational Decision Making for the Handicapped Child*, LAW & CONTEMP. PROBS., Spring, 1985, at 9; Judith Welch Wegner, *Variations on a Theme—The Concept of Equal Educational Opportunity and Programming Decisions Under the Education for All Handicapped Children Act of 1975*, LAW & CONTEMP. PROBS., Winter, 1985, at 169 (1985), both cites reprinted in BARTLETT & WEGNER, CHILDREN WITH SPECIAL NEEDS (1987).

103. JÜRGEN HABERMAS, LEGITIMATION CRISIS 45-94 (1973).

104. BARDACH & KAGAN, *supra* note 38.

### C. DISCIPLINARY BOUNDARIES AND INTERDISCIPLINARY STUDIES

The importance of an identifiable field of law and public policy puts serious strains on the traditional boundaries and content of academic disciplines and stimulates a vast outpouring of interdisciplinary work that nevertheless is undernourished (in this sense, undisciplined) because of an absence of disciplinary paradigms and supervision. I think it is fair to say that many social science fields—especially economics, political science, and law—have shrinking traditional cores and expanding applied peripheries because of the pressure of policy relevant research.

The strain on traditional academic boundaries can be seen in the case of the law school curriculum. Traditional law school training is both convergent and divergent with the domain of law and public policy. Since law and public policy is the most powerful and energetic orienting paradigm in the making and application of law, this erratic correspondence with law school training produces some disorientation within legal professional thought. On the convergence side, many areas of law, such as bankruptcy or environmental law, are closely tied to and rationalized in terms of aggregate welfare. On the side of divergence, law practice deals with fragmentary episodes of policy oriented toward client welfare; general policy design is seldom of interest. More attention is paid to doctrine than aggregate welfare; little attention is given to data and statistical analysis. And problems of the wealthy take priority over welfare of the middle class and poor (the great concerns of public policy).<sup>105</sup>

Thus, while the attractions of public policy analysis in law are many, especially since they relate to both macrolegal design and aggregate welfare, law and public policy probably never will dominate the law school curriculum. Organizing the curriculum according to the needs of law practice is simply too useful and appealing. Legal precedent, rather than social consequences, will continue to dominate legal reasoning, although the two are not mutually exclusive.

Whether the world view of law practice actually conflicts with the perspective of public policy depends on how that practice is organized by the underlying legal structures and institutions. Legal rights and entitlements can be harmoniously organized to increase aggregate welfare or can be wasteful, costly, and ineffective. As I have repeatedly stressed in this article, *all* effective policy institutions are legal institutions, in that

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105. William H. Clune, *Legal Disintegration and a Theory of the State*, in *CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE* 187 (Christian Joerges & David M. Trubek, eds. 1989); Clune, *supra* note 30.

they are composed of some combination of authoritative legal relationships. On the other hand, nothing is more common in the world of policy than the encounter with an apparently freestanding legalism that disrupts policy effectiveness. Lawyers often seem to be involved in the policy version of the tragedy of the commons,<sup>106</sup> in which the pursuit of client rights (and lawyers' fees) creates a destructive or chaotic policy structure. Much of the practical, day-to-day work of law and public policy (and most of the readings in my course) consist of efforts to criticize fields of legal relationships and to recommend reforms that would organize these relationships in a more productive manner. Obviously, nothing guarantees that the pursuit of client interest—defined, of course, through some set of legal entitlements—will necessarily serve the public interest; in fact, nothing even creates a presumption of such a guarantee. This profound ambiguity about the social desirability of particular laws is perhaps the best reason for including a public policy perspective in the law school curriculum.

#### D. ANALYTICAL TECHNIQUES AND CONCEPTUAL FRAMEWORKS USEFUL IN WORK ON LAW AND PUBLIC POLICY

Just as the emergent field of law and public policy has stimulated its own intellectual environment, the need to analyze problems of law and public policy has promoted the growth of various conceptual frameworks and analytical techniques suited to that task. Far from doing justice to each of the techniques, this section can do little more than to list the techniques and quickly sketch in the major orientation to law and public policy.

I would stress, as I do in my course, that most of the good work on law and public policy is useful from two distinct points of view: 1) it reveals a great deal about the subject matter—the legal institutions—and 2) it employs a conceptual framework which is useful beyond the particular legal/policy problem addressed. Indeed, any conceptual framework emphasized in one article could be employed equally well to analyze the subject matter and specific points of other articles, a kind of rich cross-referencing that gives the course cumulative impact.

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106. See Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968).

### 1. *Empirical/Analytical Policy Analysis*

Perhaps the most common kind of research in law and public policy is analysis and empirical study of a public policy problem from the perspective of achieving designated policy aims. The long tradition of criticism of tort law fits this tradition.<sup>107</sup> Obviously, the candidates for this category are legion and overlap heavily with the field of policy analysis.<sup>108</sup>

But in such research any sense of an empirically simple set of "effects" of legal intervention turns out to be quite misleading. Human behavior is complex, reactive and mediated by cultural and organizational constraints and perceptions. Simple effects are especially problematic in modern societies where the law operates (in the centralized-decentralized manner already described in this article) through incentives and bargaining chips that are then played out in complex, autonomous organizational and multi-lateral contexts. Ordinarily, empirical studies in modern societies are satisfying to the extent that they provide a sophisticated conceptual framework of the bargaining field and enough solid evidence to push the analysis to the point where it is possible to see these complex, indeterminate questions about legal impact.

Almost any high quality legal impact study or program evaluation can be used to illustrate these points. I will take two examples from my course in law and public policy.

In Whitford's analysis of coercive collection of consumer debts,<sup>109</sup> coercive remedies are fair and efficient to the extent that they encourage voluntary settlement. Designing the right kind of remedy requires a delicate balancing act, however, with errors possible on all sides. For example, lack of any remedies would hurt the poor because coercive remedies serve as a security interest for those without property. While lack of any regulation of private remedies might well encourage the maximum level of voluntary settlement, it would probably also lead to instances of intolerable overreaching by creditors. The desired balance would preserve enough of a threat of coercion to encourage voluntary settlement, prohibit unconscionable conduct, and remove the incentives favoring inefficient forced sale of property (such as a race to the courthouse). Thus, each exercise of policy analysis should pinpoint the level and source of

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107. SUGARMAN, *supra* note 40.

108. DAVID WEIMER & AIDAN VINING, *POLICY ANALYSIS: CONCEPTS AND PRACTICE* (1988).

109. Whitford, *supra* note 78 (many probable impacts on debt collection may be inferred through informed judgment).

empirical uncertainty, the point at which informed judgment, educated guesswork, and sheer speculation enter the analysis.<sup>110</sup>

Another interesting case is Herman Goldstein's technique of problem-oriented policing.<sup>111</sup> Goldstein recommends that the police abandon both legal doctrine and administrative efficiency as guides to operations. Legal categories like theft and sexual assault conceal drastic differences in the social patterns underlying different crimes, social patterns that must be recognized in the design of effective remedies. For example, the behaviors leading to violent stranger rape, date rape, and incest are radically different and call for distinct legal interventions. The same is true for administrative efficiency. Traditional measures of police performance such as number of arrests or number of squad cars per capita have little or no impact on the reduction of crime. But more sophisticated interventions turn out to be very difficult to evaluate because of their complexity. If the police adopt supervision of parolees to reduce stranger rape, education to reduce date rape, and mandatory arrest to prevent incest, how much of a reduction in these deeply imbedded social behaviors can be counted a success? If community policing is used to make a poverty-stricken neighborhood safer, how much extra safety can be expected from the best program? Such questions are anything but technical, because they are the key to whether programs should be widely imitated, abandoned, or redesigned.

The Goldstein example also serves nicely to introduce the manner in which values and politics enter into policy analysis and are somewhat obscured by its emphasis on consequences and aggregate welfare. For example, supervision of people paroled from sentences for violent sexual crimes must walk a delicate line between protecting the public and respecting the rights of the one supervised. Ethical questions are rife in community policing precisely because of the greatly expanded scope of police activity (everything from negotiating with landlords to legally harassing drug pushers).

## 2. *Comparative Institutional Analysis*

My colleague Neil Komesar has written several articles employing the analytical technique he calls comparative institutional analysis. Essentially this analysis is a rigorous inquiry into the relative advantages

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110. William C. Whitford, *Comment on a Theory of the Consumer Product Warranty*, 91 YALE L.J. 1371 (1982); William C. Whitford, *Lowered Horizons: Implementation Research in a Post-CLS World*, 1986 WIS. L. REV. 755.

111. GOLDSTEIN, *supra* note 88.

of various legal and social institutions in achieving designated policy purposes, especially aggregate welfare.<sup>112</sup> I have used this technique in several of my own papers.<sup>113</sup>

A special power of this framework is that it takes account of both political and technical, or regulatory capacity—the capacity of institutions to create effective policies as well as the capacity to influence behavior in the desired direction. For example, a court may be more willing than a legislature to protect the rights of minorities (political capacity) but largely ineffective in doing so (regulatory capacity). The question then becomes, essentially, whether the small amount of extra protection effectively provided is worth the costs of intervention. The costs of intervention also vary.

### 3. *Public Finance*

The part of public finance that deals with market failure and government failure<sup>114</sup> essentially is a comparative institutional analysis of the two major and paradigmatic institutions of our society, probing the interrelationship of these institutions, and determining which social functions should be allocated to each. A point essential to the study of law and public policy is that both of these major institutions, not just government, have underlying legal structures (for example, property and contract in the case of markets). Understanding the generic strengths and weaknesses of each institution is extremely useful as a sensitizing exercise in the analysis of any specific policy problem even if the grand comparison is essentially inconclusive in particular policy areas.<sup>115</sup>

### 4. *Gap Analysis in Sociolegal Studies*

In an earlier article, I pointed out that the long, rich tradition of gap studies in the sociology of law (sociolegal studies) could be seen as an examination of the complex process of politics and negotiation that occurs in the implementation of any social reform law.<sup>116</sup>

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112. See sources cited *supra* note 58.

113. William H. Clune, *Courts and Legislatures as Arbitrators of Social Change*, 93 YALE L.J. 763 (1984) [hereinafter *Courts and Legislatures*]; William H. Clune, *Institutional Choice as a Theoretical Framework for Research on Educational Policy*, 9 EDUC. EVALUATION & POL'Y ANALYSIS 117 (1987); WILLIAM H. CLUNE, *COURTS AS CAUTIOUS WATCHDOGS: CONSTITUTIONAL AND POLICY ISSUES OF STANDARDIZED TESTING IN EDUCATION* (1988).

114. WOLF, *supra* note 4.

115. WOLF, *supra* note 4. Wolf concludes sensibly that, in some specific cases, the analyses are indeterminate.

116. Clune & Van Pelt, *supra* note 42.

5. *Institutional Economics*

Although it is a field I do not deeply understand, and probably one with hazy boundaries, it seems to me that institutional economics could be characterized as an effort to specify the legal foundations of social and economic welfare.<sup>117</sup> A principal thrust of institutional economics—in fact, its claimed distinction from classical economics—is looking beyond the legal institutions of the market as sources of social and economic welfare.<sup>118</sup>

6. *Law and Economics*

It would be impossible to read this article without seeing the great influence of economic analysis. In one sense, law and public policy is law and economics. But the scope of the traditional field is much narrower, concentrating on the legal foundations of capitalism (e.g., property and contract) and traditional, common law remedies.<sup>119</sup> Much of the work seems to be advocacy based on speculative arguments. Tort law, enamored of law and economics, but heavily criticized from a broader policy perspective, is a perfect example. Perhaps, in this sense, law and economics is a difficult mixture of genuine policy analysis and the cooptation of policy reasoning by legal formalism.

Research about transaction cost economics<sup>120</sup> and public choice<sup>121</sup> adopts a more institutional perspective and, thus, goes beyond the kind of atomistic encounters of interest to neo-classical economics (specifically to encompass trust, business organizations, and governments). But this is a far cry from having an adequate theory of government in the age of welfare states. Thus, the traditional field of law and economics is mostly uninformative, because it is ideologically skeptical, about the kind of complex government interventions that coexist with the libertarian base of capitalism.

An interesting contrast with what I consider the formalism of law and economics is the powerful role of economics and economists in public policy more generally. Various aspects of economics contribute to

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117. BROMLEY, *supra* note 9; WILLIAMSON, *supra* note 65.

118. DUGGER, *supra* note 19.

119. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Epstein, *supra* note 30.

120. See WILLIAMSON, *supra* note 65; D. Bruce Johnsen, *Wealth is Value*, 15 J. LEGAL STUD. 263 (1986).

121. Komesar, *supra* note 90.

this strong role, not simply expertise about our dominant social institution (the market), but more generally an understanding of how to model and estimate aggregate welfare (with complex sets of offsetting costs and benefits) as well as behavioral responses to the complex, cross-cutting incentives of public policies. The marriage of these skills with knowledge about institution-building and effective politics would provide a more complete package of tools for public policy in the welfare state.

### 7. *Implementation Analysis*

Closely akin to gap studies, implementation analysis can be seen as the description of social policy worked out over time through multiple agencies and complex negotiations, often involving large-scale organizations.<sup>122</sup>

### 8. *Analysis of Institutional Litigation*

While institutional litigation is perhaps more of a subject matter than an analytical technique, it provides a rich example of the evolution of fragmentary legal structures to meet aggregate social and economic purposes.<sup>123</sup> Since this evolution occurs over a short period of time and on a manageable local scale, institutional litigation provides a concretely visible historical study of, in effect, institutional economics, and, synonymously, law and public policy. Institutional litigation is an exercise of aggregate social welfare combining emphasis on social outcomes, equity, and politics. Institutional litigation is also a superb study for comparative institutional analysis, because it represents the court's opportunity to correct a political flaw in the legislature while straining to overcome its own serious deficiencies in both technical and political capacity (for example, getting prisons to change and getting legislatures to raise extra funds).<sup>124</sup>

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122. BARDACH, *supra* note 60; see WILLIAMSON, *supra* note 65; Johnsen, *supra* note 120, at 253; JEFFREY L. PRESSMAN, & AARON B. WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND: OR, WHY IT'S AMAZING THAT FEDERAL PROGRAMS WORK AT ALL, THIS BEING A SAGA OF THE ECONOMIC DEVELOPMENT ADMINISTRATION AS TOLD BY TWO SYMPATHETIC OBSERVERS WHO SEEK TO BUILD MORALS ON A FOUNDATION OF RUINED HOPES (1984); Clune, *supra* note 42; Clune & Lindquist, *supra* note 42; Clune & Van Pelt, *supra* note 42.

123. Eisenberg & Yeazell, *supra* note 61; LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM (1989).

124. Clune, *Courts and Legislators*, *supra* note 113.

9. *Analysis of Law Reform and Legal Change*

Analysis of law reform and legal change illustrates a number of key elements of law and public policy, such as the importance of social groups, law reform organizations,<sup>125</sup> and the incrementalist process of changing underlying legal values.<sup>126</sup>

10. *Critical Legal Studies (CLS) and the Deconstruction of Legal and Social Science Aggregations.*

While critical legal studies has many facets and motivations,<sup>127</sup> I find it particularly useful as a means of deconstructing the powerful tendency of law and public policy to assert depoliticized, supposedly neutral, aggregate, and global social and economic interests. These interests can be efficiency, the public interest, the policy of security in markets, and so forth.<sup>128</sup> The preoccupation with politics, and the original focus on collective welfare in judicial decisions, also mark CLS as a child of the welfare state.

Other aspects of critical legal studies—critical race theory, for example—are more direct applications of law and public policy in the sense used here. Critical race theory has at least three characteristics that are compatible with an orientation toward law and public policy: (1) a steady concern with pragmatic results, measurable in aggregate terms, as opposed to conceptual jurisprudence;<sup>129</sup> (2) explicit attention to the effectiveness of legal structures over a period of time, including, of course, their representative structure;<sup>130</sup> and (3) a concern with the repression of selected social outcomes and experiences within legal and policy analysis; in this sense, one can see storytelling as an important empirical technique.<sup>131</sup>

Occasionally, critical race theory seems more compatible with a legalistic approach—for example, with respect to: (1) a countertendency

125. See generally JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

126. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICAS STRUGGLE FOR EQUALITY* (1977); Clauss, *supra* note 20.

127. See generally the special issue, 36 *STAN. L. REV.* (vols. 1 & 2, 1984).

128. Kennedy, *supra* note 19.

129. Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 *HARV. L. REV.* 1864 (1990).

130. Linda G. Greene, *Race in the 21st Century: Equality Through Law?*, 64 *TUL. L. REV.* 1515 (1990).

131. See the special issue on legal storytelling, 87 *MICH. L. REV.* (1989). See also Schultz, *supra* note 20.

to be concerned with legal text as a system of meaning detached from connection with aggregate welfare; (2) a preoccupation with what might be called legal policy instruments such as litigation and regulation, without a serious analysis of the costs and pathologies of these techniques and without a broader sense of effective program design.<sup>132</sup> The idea that critical race theory is more practical and empirical than old-style law and economics is contrary to some conventional wisdom but nevertheless seems well supported by the facts. Thus, despite its esoteric name, critical race theory is a good example of law and public policy as defined in this article.

### 11. *Analysis of Political Representation in Light of Welfare Aims*

A particularly useful look at institutional analysis is the consideration of political representation in light of social and economic aims.<sup>133</sup> Problems of political organization and policy formation appear in every area of policy.<sup>134</sup>

### 12. *Some Conspicuous Problems and Omitted Concerns of Law and Public Policy*

A reading to this point might give an extremely optimistic, progressive, even utopian impression of the welfare state and its institutions—an impression of high levels of collective welfare, orderly social engineering, smoothly functioning institutions adapting themselves to social needs, and so on. But despite such impressions, nothing could be further from the truth.

While modern societies have achieved extraordinary levels of production and remarkable levels of social organization, it is also true that

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132. Some of the policy insensitivity comes, I believe, from an excessive one-sidedness of the analysis—a failure, for example, to see that effective functioning of autonomous institutions is as necessary for racial equality as it is for more general aggregate welfare. Even here, critical legal studies seems more sensitive to public policy than other forms of legal analysis. Critical legal studies includes, for example, exactly the kind of serious analysis of the ultimate effectiveness of a structure of legal rights that is missing in law and economics. Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law*, 101 HARV. L. REV. 1331 (1988); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (1982); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C. R.-C. L. L. REV. 401 (1987).

133. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971); see also Rogers, *supra* note 36.

134. See CALABRESI, *supra* note 54; CLUNE & VAN PELT, *supra* note 42; Cohen, *supra* note 57; Lemann, *supra* note 56; LOWI, *supra* note 55; NOBLE, *supra* note 40; and Rogers, *supra* note 36 and accompanying text.

the welfare state and all its policy areas are suffering from malaise, uncertainty, and ineffectiveness. A good characterization of policy analysis in the welfare state would be problems, problems, problems.<sup>135</sup>

This atmosphere of discontent is well founded and has several sources. One could view the welfare state as a process by which industrialism, capitalism, or the market constantly serves up a series of intractable problems to a set of institutions ill-suited to solve them. One reason I introduce market and government failure early in the course on law and public policy<sup>136</sup> is that such discussions offer insight on the ultimate source of policy problems and the generic difficulties government has in addressing them. Every policy analyst should have a deep understanding of the combination in modern societies of difficult problems and imperfect tools. A sense of limited horizons works its way into every useful form of policy analysis. An appropriate sense of lowered expectations and chastened optimism is, for example, one of the latent benefits of using Komesar's comparative institutional analysis (wherein the most effective institution often is the least objectionable of relatively ineffective choices).<sup>137</sup>

Thus, in general, the presence of vigorous, highly tuned problem solving skills and the rapid development of sophisticated legal institutions designed to meet social problems says absolutely nothing about relative or absolute success in actually solving those problems. For example, we have a set of highly sophisticated institutions charged with environmental protection that are having mixed success and may not be able to avoid massive environmental destruction.<sup>138</sup>

The crisis of confidence in the welfare state and its institutions goes beyond the level of modesty in claims for social engineering and policy analysis. It raises questions of fundamental flaws and contradictions.

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135. Several summaries of social program implementation suggest, essentially, that nothing works. See, e.g., Richard F. Elmore & Milbrey McLaughlin, *Steady Work: Policy, Practice, and the Reform of American Education* (1988); PRESSMAN & WILDAVSKY, *supra* note 123; Milbrey McLaughlin, *Learning from Experience: Lessons from Past Implementation*, 9 EDUC. EVALUATION & POLY. ANALYSIS 171 (1987). But see William H. Clune, *Educational Policy in a Situation of Uncertainty: Or, How to Put Eggs in Different Baskets*, in THE POLITICS OF CURRICULUM AND TESTING: 1990 YEARBOOK OF THE POLITICS OF EDUCATIONAL ASSOCIATION (Susan H. Fuhrman & Betty Malen eds. 1991). Indeed, analysis of crisis in the welfare state has itself become a major focus of scholarship. See, e.g., HABERMAS, *supra* note 103; RAMEESH MISHRA, THE WELFARE STATE IN CRISIS: SOCIAL THOUGHT AND SOCIAL CHANGE (1984); CLAUS OFFE, CONTRADICTIONS OF THE WELFARE STATE (1984); CLAUS OFFE, DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS (1985).

136. WOLF, *supra* note 4.

137. See sources cited *supra* note 58.

138. FINDLEY & FARBER, *supra* note 19.

High on the list certainly must be the capacity for modern war technology to destroy the world at almost any moment. Also, in this, as in almost every other way, environmental protection is a paradigmatic case. The productive process that is the source of our wealth, problems, and legal institutions may be consuming the ecology that supports it. Material welfare and environmental welfare may be radically incompatible or, even more provocatively, require an entirely new set of legal institutions based on social and economic stability rather than on growth.<sup>139</sup>

Problems of political disorganization and dysfunction frequently mentioned in this article may go beyond constraints and reach crisis proportions. If every area of public policy presents serious problems for politics, the sum total, with all the interactive complexities and contradictions, may reach crisis proportions and vastly exceed the problem solving capacity of collective human action.<sup>140</sup> One thinks, for example, of the political deadlock over the budget deficit in the United States and the associated gridlock of positive social policy.

Social and economic class division has always been a problem for highly developed productive systems and may be reaching critical levels. The difficulty of maintaining high levels of production and consumption may be creating an invidious two-class yuppie syndrome in which large numbers of people are, basically, discarded and officially declared outside the system, the product of social and policy failure (in a policy sense relegated to economic subsistence and the criminal justice system). Some welfare in welfare states is more equal than others; and severe inequality can disrupt the general welfare through political and social unrest.<sup>141</sup>

Despite the tendency for speculation and exaggeration, I do not think it is an accident that the orderly thought processes of policy analysis and social engineering can give way in a moment to serious anxiety about the feasibility of the whole enterprise. System anxiety is an irreducible feature of the welfare state and a legitimate focus of serious scholarly analysis. We seem to live in a high-strung society correspondingly subject to nervous breakdowns.

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139. See Kenneth E. Boulding, *The Economics of the Coming Spaceship Earth* in ENVIRONMENTAL QUALITY IN A GROWING ECONOMY 3 (1966).

140. LOWI, *supra* note 55; James O'Connor, *The Fiscal Crisis of the State* (1973); MARCH & OLSEN, *supra* note 14; HABERMAS, *supra* note 103.

141. EDSALL, *supra* note 32.

13. *The Theory of Empowerment and the Transfer of Useful Institutional Design from One Area of Policy to Another*

I would like to work toward a summary and conclusion with a couple of examples of how the analysis of this article has potential value in social problem solving and how politics in modern societies might support such a transfer from one area of policy to another.

To summarize points made earlier: Legal institutions in the welfare state are oriented toward both high performance (often economic efficiency) and social equity (the distribution of social goods). To be effective, legal institutions combine strong central guidance with a high degree of delegation, decentralization, and even empowerment. A general theory of empowerment would hold that we need to deliver five kinds of resources to those people we wish to become more active: legal rights, finances, information, access to useful organizations, and political power.<sup>142</sup> A similar conceptual framework holds that legal institutions deliver three kinds of essential support for productive activities: guidance about ultimate aims, the fundamental framework for decentralized action, and a set of productive resources.<sup>143</sup> In conclusion, I would like to apply these ideas to two areas of public policy: race and poverty, and public education.

First, race and poverty. Historically, society has approached these areas with negativism, destruction, and neglect, an approach that has intensified recently because of the economic isolation of inner cities. A major problem with poverty policy has been such policy's inability to effectuate an effective transfer of resources (e.g., delivery of resources to middle class poverty workers). It is now becoming accepted that as a society we will pay an enormous price for failure in this area of policy, manifested primarily in reduced competitiveness.<sup>144</sup> Society also is now accepting the idea, that the key to success is a high level of active participation by the poor. The need is for empowerment, not merely welfare, though cash is one element of empowerment.

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142. See Handler, *Dependent People, The State, and the Modern/Postmodern Search for the Dialogic Community*, *supra* note 25; HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY*, *supra* note 25; Handler, *supra* note 47; KANTER, *supra* note 25; OSBORNE & GAEBLER, *supra* note 64; EDWARD E. LAWLER III, *HIGH INVOLVEMENT MANAGEMENT, PARTICIPATIVE STRATEGIES FOR IMPROVING ORGANIZATIONAL PERFORMANCE* 42-43 (1991).

143. HURST, *supra* note 18.

144. National Center on Education and the Economy, *supra* note 10.

More effective legal institutions being discussed today emphasize facilitation and more effective delivery of resources, including educational vouchers, regional business development, business/education partnerships, improved employment training, family planning, health insurance, a full family policy (e.g., released time from employment for child care).<sup>145</sup> This bundle of policies and supporting institutions is strongly oriented toward improving the capacity and participation of individuals and families. Marian Wright Edelman, for example, proposes the idea of a national institutional structure for child care.

In view of the problem of persistent poverty in the U.S., we should ask which elements of empowerment are most lacking in existing policy. Conservatives often ask why job opportunities and inexpensive formal education (e.g., community colleges) do not eliminate poverty. The most obvious answer may be the elimination or under-funding of basic programs such as job training, child care, and health services. But we may also need a basic change in perspective. People in extreme poverty (for example, single mothers and their children, undereducated minority men) cannot take advantage of these opportunities because of a series of deficits: basic skills, poor health, lack of child care, deteriorated and unsafe housing, and lack of access to networks and opportunities (implying the need for affirmative action in employment and transition programs from prisons to employment). The social cost of persistent poverty is enormous welfare costs, loss of economic productivity, incarceration, catastrophic illness and health costs, and urban riots to name a few. Our society probably has not faced up to the magnitude of the investment required to empower its most devastated citizens nor comprehended the large returns that could be realized.

Of course, the cost would be immediate, while the returns would be delayed. On the other hand, many ingredients of empowerment might be provided through the organization of voluntary services, for example, community action (business partnerships, etc.) and middle class adults helping with families and schools. A well functioning family, especially one with adequate resources, is perhaps the greatest source of human investment.<sup>146</sup> Poor children often have received low levels of investment from the adults in our society; consequently, poor families need

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145. *E.g.*, ROBERT HAVEMAN, *STARTING EVEN: AN EQUAL OPPORTUNITY PROGRAM TO COMBAT THE NATIONS NEW POVERTY* (1988).

146. *See* PAUL E. BARTON & RICHARD J. COLEY, *AMERICA'S SMALLEST SCHOOL: THE FAMILY* (1992).

their resources supplemented (again, the basic resources of empowerment: legal rights, finances, information, access to organizations, and political power).<sup>147</sup> Current policy interest in the family, family services, school readiness, community organizing, and integrated social services may signal the birth of a new vision of poverty policy based on dynamic empowerment rather than static subsistence.<sup>148</sup> We should take care not to reinvent the problems of bureaucracy in this exercise, however. Children need regular contact with a reasonably well informed caring adult as much or more than "one stop shopping" for social services in schools.<sup>149</sup>

Second, consider education. Today, debate centers on three policy approaches, each of which strives to achieve a high degree of decentralized activity on the part of teachers, parents, and students and a strong resource delivery system.<sup>150</sup> Instructional guidance (curriculum guides, materials, student tests, teacher training) tries to introduce the highest possible learning objectives into the curriculum, providing valuable guidance and a sense of professionalism for the teacher, while at the same time permitting and encouraging a high degree of activity by individual teachers and teachers in groups, as well as an increased level of activity by students.<sup>151</sup> School site autonomy<sup>152</sup> and teacher-owned schools<sup>153</sup> aim to energize the staff of schools by decentralizing authority, but they also depend on a supportive bureaucratic environment and adequate training. Finally, consider family choice.<sup>154</sup> Such choice is an attempt to focus and intensify educational effort by encouraging both competition

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147. See JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS, THE IMPACT OF COMMUNITIES 221-31 (1987) (discussing human capital and "social capital," both inside and beyond the family).

148. See generally LISBETH SCHORR (WITH DANIEL SCHORR), WITHIN OUR REACH, BREAKING THE CYCLE OF DISADVANTAGE (1988).

149. See Michael Kirst, *Financing School-Linked Services* (Policy Brief No. 7, Center for Research in Education Finance, University of Southern California, January, 1992).

150. See generally Clune, *supra* note 135.

151. Marshall S. Smith & Jennifer O'Day, *Systemic School Reform*, in THE POLITICS OF CURRICULUM AND TESTING: 1990 YEARBOOK OF THE POLITICS OF EDUCATIONAL ASSOCIATION (Susan Fuhrman & B. Malen, eds., 1991).

152. WILLIAM H. CLUNE & PAULA WHITE, SCHOOL-BASED MANAGEMENT: INSTITUTIONAL VARIATION, IMPLEMENTATION, AND ISSUES FOR FURTHER RESEARCH (1988); Priscilla Wohlstetter & Allan Odden, *Rethinking School-Based Management Policy and Research* (Working Paper No. 11, Center for Research in Education Finance, University of Southern California, September, 1991).

153. LIEBERMAN, *supra* note 46; TED KOLDERIE, BEYOND CHOICE TO NEW PUBLIC SCHOOLS: WITHDRAWING THE EXCLUSIVE FRANCHISE IN PUBLIC EDUCATION (1990); Paula White, *Teacher Participation in School Decision-making: Decentralization of Authority to the School Site* (1990) (Unpublished dissertation, University of Wisconsin, Madison).

154. See generally the sources cited *supra* note 46.

and community while reducing distracting political and bureaucratic influences. These three approaches can be combined in different ways.<sup>155</sup>

Similar profiles could be drawn for numerous areas of public policy such as antitrust, bankruptcy, environment, insurance, commercial law, equal employment, international trade, human rights, etc. One quality that I especially like about the conceptual framework is how it draws together policy, research, practice, and ethics. In the complex global village, policy and practice are united in trying to provide an environment for productive activity.<sup>156</sup> Ethical questions are naturally accommodated, because the framework is expressly normative, aiming for both aggregate welfare and equity. The openness of the model to ethics and politics protects it from the characteristic determinism of historical functionalism.<sup>157</sup> Yet policy, practice, and ethics all depend on superior data and basic theory about the performance and interaction of different kinds of institutions. As described, law and public policy encourages and integrates most of what its practitioners consider most important.

#### 14. *The Generic Politics of Public Policy*

Some may have wondered about the political processes and structures underlying the basic propositions in this article (primarily, the adaptation of legal institutions to problems of the welfare state). This is probably the topic for another article; but I do not regard the basic mechanisms as much of a mystery. In their order of importance, I would cite three fundamental historically connected forces: (1) the orientation of business toward institutions supporting trade and prosperity, coupled with the staggering political power of business in politics; (2) the political power of the middle class created as an integral part of welfare states; and (3) the growth of policy analysis and data gathering capacity. It seems to me that these forces are sufficient to impose a logic of economic rationality on politics.

Public choice theory, by dealing with trans-historical categories like majorities and minorities, purports to be relatively independent of historical and social context. Yet almost all of the examples concern the operation of democracy in complex economies. For example, Neil Komesar believes that the willingness of the Federalists to tolerate special interest politics operating in complex political structures was due to their fear of

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155. Clune, *supra* note 135.

156. See Clune, *supra* note 30, at 731-32 n.58, for the origin in my work of this idea.

157. Robert M. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

majoritarian excess.<sup>158</sup> I would suggest that their worst fears concerned majoritarian disruptions of the economy and their fear of special interests was greatly mollified by their confidence in the broader goals of the business community as a whole. Our problem today is to broaden institutional frameworks beyond traditional middle class and business interests and begin recognizing the infrastructure of culture and community which breathes life into systems of empowerment.<sup>159</sup>

#### IV. CONCLUSION: THE PARADOX OF "EMPOWERMENT"

In looking back over this article, I find myself intrigued by the interplay of social context, instrumental analysis, and social criticism. Nothing could provide a better example than the central concept of "empowerment." In the first place, empowerment rests on a flagrant contradiction: one is empowered to do a defined task, that is, the will of someone else, or of a group. In the context of modern production, the basic rationale for empowerment from a system point of view is to elicit a higher level of energy and cooperation (to make people work harder and be more compliant). Thus, the heightened sense of activity, energy, and autonomy for the individual corresponds to an increased level of integration into the culture of production and consumption (for example, increased psychic attachment to consumer goods and high-productivity employment). Empowerment is at once autonomy and social control, luxury and scarcity, freedom and slavery. I think, in this respect, about the changing role of women and the women's movement. The shift from domestic labor to paid labor, the shift from low level jobs to high level jobs, and the growing role in public life must represent one of the most stunning possible stories of empowerment (or, as it used to be called, liberation). But the price also has been steep: extraordinary levels of labor and effort and wrenching conflicts over how to reconcile economic roles with reproduction and family life, for example.

The same pattern exists at the level of the system. The astonishing productivity of the modern world economy, the intensity, complexity, and sheer energy of all the coordinated activity, is a stunning accomplishment, completely unprecedented in the history of the world and the human race. No wonder, then, that there are questions about sustainability. Can we continue to make more people more wealthy without

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158. The insights of public choice about such topics as special interests and cycling are valuable in the analysis of welfare state politics. See Komesar, *supra* note 90.

159. Compare the role of professional norms and attitudes in Handler, *supra* note 47, with those in GOLDSTEIN, *supra* note 88.

destroying the environment? Are we approaching some ominous limit on how many people can be successfully integrated into the global economy?<sup>160</sup> Are we reaching limits on the cognitive problem solving capacity of the system and the extent to which people's behaviors can be shaped into high energy, productive enterprises?

Thus, far from an unambiguous triumph of human progress, empowerment, and the entire system of law and public policy, is an unfolding story full of drama and surprise. The most interesting question to me is whether the experience of increased autonomy will itself become autonomous, leading people to push the system in the direction of greater leisure and full human satisfaction.<sup>161</sup> Should that occur, perhaps we will have created a new kind of public policy and law.

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160. Richard B. McKenzie, *The First and Second Reich: the Taming of An Industrial-Policy Advocate*, 11 *Cato Journal* 47, 60 (discussing the "fortunate fifth" of income earners who are competitive in a global economy); JOHN KENNETH GALBRAITH, *THE CULTURE OF CONTENTMENT* (1992) (prosperous class in U.S. near a numerical majority and politically dominant).

161. This, rather than sociology in a descriptive sense, was the burning topic for the great original sociologists—Durkheim, Marx, Weber—and probably for the original economists, such as Adam Smith.

